Supreme Court, U.S.
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No.

In The

Supreme Court of the United States

October Term, 1995

PREFERRED MEAL SYSTEMS, INC.,

Petitioner,

v.

MARIE A. KALWAYTIS; PEGGY JACKSON; LYDIA T. HREBEN; SHIRLEY MUSTICH,

Respondents.

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

When employees fail to receive the proper notice of plant closing under the Workers Adjustment and Retraining Notification Act ("WARN Act"), 29 U.S.C. §§ 2101 *et seq.*, are they entitled to receive damages for each calendar day of the improper notice period, or only for work days within the improper notice period?

LIST OF PARTIES

The parties to the proceedings below were Petitioner, Preferred Meal Systems, Inc., and Respondents Marie A. Kalwaytis, Peggy Jackson, Lydia T. Hreben, and Shirley Mustich.

RULE 29.6 DISCLOSURE

Petitioner Preferred Meal Systems, Inc., has no parent company or non-wholly owned subsidiary companies.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Preferred Meal Systems, Inc., prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Third Circuit, entered in the within proceeding on March 11, 1996.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Third Circuit that gives rise to this petition is reported at 78 F.3d 117 (3d Cir. 1996). It is reprinted in the Appendix hereto as App. A *infra*, 1a-13a. A Memorandum Decision Granting Respondent's Motion for Summary Judgment issued by the United States District Court (Middle District of Pennsylvania), filed December 9, 1994 is reprinted in the Appendix hereto as App. B *infra*, 14a-31a. A second Memorandum Decision filed by the District Court on March 1, 1995 denying a motion to reconsider, setting pre-judgment interest and awarding counsel fees is reprinted as App. C *infra*, 32a-56a. The foregoing Memorandum Decisions are not reported. Reprinted in the Appendix hereto as App. D. *infra* (57a) and App. E *infra* (58a-62a) respectively is an Order of the District Court and a Final Judgment, both filed March 1, 1995.

JURISDICTIONAL STATEMENT

Invoking federal jurisdiction under the Worker Adjustment and Retraining Notification Act (WARN), 29 U.S.C. § 2104, on March 15, 1993, the Respondents filed in the United States District Court, for the Middle District of Pennsylvania a Summons and Complaint asserting Petitioner violated WARN, 29 U.S.C. §§ 2101 *et seq.* On December 9, 1994 the District Court, by Memorandum Decision (14a-31a) denied Petitioner's motion for summary judgment and granted Respondents' motion for summary judgment. A second Memorandum Decision (32a-56a) denying, *inter alia*, Petitioner's Motion to Reconsider was filed by the District Court on March 1, 1995. Petitioner timely appealed to the Third Circuit.

On March 11, 1996 the Third Circuit entered an Opinion and Order (1a-13a) affirming the holding of the District Court that Petitioner is liable under the WARN Act. However, the Circuit Court remanded the matter to the District Court to recalculate damages in accordance with the Circuit Court Opinion (2a, 11a-13a). The jurisdiction of this Court to review the Opinion and Order of the Third Circuit is invoked pursuant to 28 U.S.C. § 1254(1).

STATUTE INVOLVED

29 U.S.C. Section 2104. *Administration and enforcement of requirements*

(a) *Civil actions against employers* – (1) Any employer who orders a plant closing or mass layoff in violation of section 2102 of this title shall be liable to each aggrieved

employee who suffers an employment loss as a result of such closing or layoff for –

(A) back pay for each day of violation at a rate of compensation not less than the higher of –

(i) the average regular rate received by such employee during the last 3 years of the employee's employment; or

(ii) the final regular rate received by such employee; and

(B) benefits under an employee benefit plan described in section 1002(3) of this title, including the cost of medical expenses incurred during the employment loss which would have been covered under an employee benefit plan if the employment loss had not occurred.

Such liability shall be calculated for the period of the violation, up to a maximum of 60 days, but in no event for more than one-half the number of days the employee was employed by the employer.

(2) The amount for which an employer is liable under paragraph (1) shall be reduced by –

(A) any wages paid by the employer to the employee for the period of the violation;

(B) any voluntary and unconditional payment by the employer to the employee that is not required by any legal obligation; and

(C) any payment by the employer to a third party or trustee (such as premiums for health benefits or payments to a defined

contribution pension plan) on behalf of and attributable to the employee for the period of the violation.

In addition, any liability incurred under paragraph (1) with respect to a defined benefit pension plan may be reduced by crediting the employee with service for all purposes under such a plan for the period of the violation.

(3) Any employer who violates the provisions of section 2102 of this title with respect to a unit of local government shall be subject to a civil penalty of not more than $500 for each day of such violation, except that such penalty shall not apply if the employer pays to each aggrieved employee the amount for which the employer is liable to that employee within 3 weeks from the date the employer orders the shutdown or layoff.

(4) If an employer which has violated this chapter proves to the satisfaction of the court that the act or omission that violated this chapter was in good faith and that the employer had reasonable grounds for believing that the act or omission was not a violation of this chapter the court may, in its discretion, reduce the amount of the liability or penalty provided for in this section.

(5) A person seeking to enforce such liability, including a representative of employees or a unit of local government aggrieved under paragraph (1) or (3), may sue either for such person or for other persons similarly situated, or both, in any district court of the United States for any district in which the violation is alleged to have occurred, or in which the employer transacts business.

(6) In any such suit, the court, in its discretion, may allow the prevailing party a reasonable attorney's fee as part of the costs.

(7) For purposes of this subsection, the term, "aggrieved employee" means an employee who has worked for the employer ordering the plant closing or mass layoff and who, as a result of the failure by the employer to comply with section 2102 of this title, did not receive timely notice either directly or through his or her representative as required by section 2102 of this title.

(b) *Exclusivity of remedies* – The remedies provided for in this section shall be the exclusive remedies for any violation of this chapter. Under this chapter, a Federal court shall not have authority to enjoin a plant closing or mass layoff.

STATEMENT OF THE CASE

Preferred Meal Systems, Inc. (hereinafter Preferred or Petitioner) operated a factory which prepared pre-packaged meals for schools in Moosic, Pennsylvania (2a, 15a).

In May and June, 1992, Preferred laid off 85 of its approximately 124 employees due to the seasonal nature of its business (2a, 15a). On June 26, 1992, Preferred sent its employees a letter advising that Preferred would be shutting down its food service operations and permanently laying off its employees, effective August 1, 1992 (3a, 16a). The letter further stated that another company would be used to provide food service employees at the

Moosic, Pennsylvania location, and that the new company "has an immediate offer of employment to make to you" (3a, 16a). On the same day, the new company informed the Preferred employees that it would be recruiting for certain positions (3a, 16a-17a).

On July 10, 1992, Preferred again wrote to its employees. The letter stated that its " . . . June 26 letter may have incorrectly conveyed the impression that . . . , the new employer has an offer of employment to make to you" (3a, 18a). Preferred stated that there would be no such offer at this time, and any such offer would depend on the new company's discretionary judgment (3a, 18a).

Preferred ultimately retained some of its employees, and the new employer hired many, but not all of the remainder of Preferred's employees (4a).

Respondents, consisting of a class of sixty-nine former Preferred employees, filed a complaint in the United States District Court for the Middle District of Pennsylvania against Preferred, asserting that Preferred failed to give them sixty days notice of a mass lay-off as required under the Workers Adjustment and Retraining Notification Act ("WARN"), 29 U.S.C. §§ 2101 *et seq.* (14a). Preferred asserted that it was a joint employer with the new employer, and that as a result of that relationship, insufficient numbers of employees suffered an "employment loss" under WARN (4a-6a, 21a). Preferred also contended that the time between the seasonal lay-off in May and the actual subcontracting with the new employer in late June should not be considered as part of the WARN violation period (4a-6a).

The District Court in an unreported decision (App. B, 14a-31a) found that the size of the work force and the number of employees affected brought this matter properly before the Court. The ju ge granted summary judgment and awarded damages to the Respondents (31a). The District Court rejected Preferred's joint employer defense (25a-30a). The District Court also held that Respondents' expectations of returning to Preferred's employment were destroyed as of the date of the first letter, (i.e., June 26, 1992), when the temporary lay-off became permanent (40a). The court concluded that because they had not received notice 60 days before that date, the Respondents were entitled to damages (41a). Applying Third Circuit's precedent, the judge directed each Respondent be awarded damages equal to 60 times their daily wage (39a-41a).

The Third Circuit affirmed the District Court in a unanimous decision reported at 78 F.3d 117 (3d Cir. 1996) reprinted as App. A (1a-13a). The Court of Appeals held that Preferred was not a joint employer with the new employer (6a). The Court held that the June 26, 1992 and July 10, 1992 letters sent by Preferred constituted adequate notice under the WARN Act (10a-11a). The Court further held that the WARN Act violation period began either on the date an employee reasonably expected to return to work after the seasonal lay-off, or on the date of termination specified in Preferred's June 26, 1992 letter (i.e., August 1, 1992) whichever was earlier (11a-12a). Finally the Court of Appeals affirmed the District Court's calculation of damages on the basis of *calendar* days instead of *work* days (7a, 11a-12a).

REASONS FOR GRANTING THE WRIT

The Third Circuit's Award Of Damages Based On "Calendar" Days Rather Than "Work" Days Squarely Conflicts With The Decisions Of The Fifth And Tenth Circuits.

The decision below directly conflicts with the Fifth Circuit's decision in *Carpenters District Council v. Dillard Department Stores, Inc.*, 15 F.3d 1286 (5th Cir. 1994) *cert. denied* ___ U.S. ___, 115 S.Ct. 933 (1995) and the Tenth Circuit's decision in *Frymire v. Ampex Corp.*, 61 F.3d 757, 771-772 (10th Cir. 1995).

The Third Circuit first considered the issue of calendar days vs. work days in *United Steelworkers of America v. North Star Steel Co.*, 5 F.3d 39, 42-43 (3d Cir. 1993) *cert. denied* ___ U.S. ___, 114 S.Ct. 1060 (1994). In *North Star*, the Court of Appeals interpreted 29 U.S.C. § 2104(a)(1)(A) which requires "back pay for each day of violation" and held that employees who were laid off with less than sixty days of advance notice (in violation of WARN) were entitled to back pay for sixty *calendar* days rather than the number of *work* days contained within the violation period. The Court found the foregoing statutory language "clear" and concluded that "WARN uses the term 'back pay' simply as a label to describe the daily rate of damages payable." 5 F.3d at 43. The Third Circuit rejected arguments that the term "back pay" describes lost earnings in the traditional labor-relations context. Cf. *Phelps Dodge Corp. v. NLRB*, 313 U.S. 177 (1941).[1]

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[1] The Third Circuit refused to consider hypothetical situations which demonstrated the inequities inherent with the "calendar day" approach such as the following:

The Third Circuit's approach (which remains unchanged in the instant matter), was subsequently rejected by the Fifth Circuit in *Dillard*. The Fifth Circuit noted that "back pay" connotes wages and benefits an employee would have earned if the event affecting compensation had not occurred. In this regard, the Court analyzed the legislative history and concluded that the calendar day approach would provide damages in excess of what would have been paid had the plant remained open.[2] Thus, the Fifth Circuit's interpretation of 29 U.S.C. § 2104(a)(1)(A) mandates compensation for lost earnings

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> Assume that an employer violates WARN by laying off employees and that the period of the violation is sixty days. Assume further that aggrieved employee "A" was a full-time employee who worked a regular 8 hour day each weekday (i.e. Monday through Friday). Finally, assume that aggrieved employee "B" was a part-time employee who worked just one 10 hour day each Saturday." 5 F.3d at 43.

Under the Third Circuit's calendar-day approach, employee "A" would receive 480 hours pay in lieu of notice (eight hours per day times sixty days) while part-time employee B would receive 600 hours pay (ten hours per day times sixty days). Thus, it would be anomalous for the one-day-per-week employee to receive 120 hours pay over and above that paid to the five-days-per-week full-time employee. Under the calendar day approach, the full-time employee is treated inequitably, and the part-time employee receives a windfall. Moreover, employers are also severely penalized for choosing to pay damages in lieu of notice.

[2] Assuming a five day work week, employees would receive approximately forty-four days of back pay under the work-day approach. Under the calendar-day approach, these employees would receive up to sixty days of pay. If sixty days notice is given, and the employees work the entire period, they would only receive forty-four days of wages.

rather than for each calendar day within the violation period. The Fifth Circuit stated that hypothetical situations (as mentioned herein in footnote one) illustrates that the Third Circuit's holding produced an illogical result for which Congress did not intend. Finally, the Fifth Circuit relied upon this Court's decision in *Phelps* for guidance as well as the legislative history of the WARN Act (S. Rep. No. 62, 100th Cong., 1st Sess. 24 1987)) to conclude that the work day approach is the correct approach for calculating WARN damages.[3]

The Tenth Circuit, when confronted with the above mentioned conflicting positions in *Frymire*, adopted the Fifth Circuit's interpretation of 29 U.S.C. § 2104(a)(1)(A). In this regard, the Tenth Circuit found that a calculation of WARN damages based on work days "better reflects the statutory purpose" of WARN 61 F.3d at 772.

In addition to *Dillard* and *Frymire*, the Third Circuit's approach has also been rejected by a number of district courts. In *Washington v. Aircap Industries Inc.*, 860 F. Supp. 307 (D.S.C. 1994), the District Court of South Carolina noted that the term "back pay" commonly means wages or benefits an employee would have earned absent a violation and WARN's legislative history supported this approach. See also *Jones v. Kayser-Roth Hosiery, Inc.*, 748 F. Supp. 1292, 1296 (E.D. Tenn 1990) (District Court awarded back wages for nineteen "business" days during

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[3] This Senate Report states in pertinent part:

"[f]or violations of the notice provisions, damages are to be measured by the wages . . . the employee would have received had the plant remained open or the layoff had been deferred until the conclusion of the notice period . . . "

a twenty-seven day violation period). Other district courts however, have adopted the Third Circuit's approach. In *Siniscalchi v. Shop-Rite Supermarkets, Inc.*, 903 F. Supp. 182 (D. Mass. 1995) the District Court of Massachusetts recognized the split between the circuits regarding the calculation of WARN damages and concluded the Third Circuit's approach was correct. See also *Joshlin v. Gannett River States Publ. Corp.*, 840 F. Supp. 660, 663 (E.D. Ark. 1993) and *Bentley v. Arlee Home Fashions, Inc.*, 861 F. Supp. 65, 68 (E.D. Ark. 1994).

It is submitted that the holding of the Third Circuit as reflected in *North Star* and the current case is contrary to the language and legislative history of 29 U.S.C. § 2104(a)(1)(A). The decisions of the Fifth Circuit in *Dillard* and the Tenth Circuit in *Frymire* present the better reasoned approach. In this case, the Third Circuit's calendar-day approach produces an unnecessary hardship for Petitioner (and a windfall for Respondents) for which Congress did not envision or intend. Specifically, the Third Circuit's opinion would require payment for days the Respondents would have been on *normal seasonal layoff*, and for *regular days off* during the notice period (6a-13a).

Further, the conflict between the views of the Fifth and Tenth Circuit on one hand and the Third Circuit on the other hand (as well as the various district courts) as to the correct statutory construction of the WARN Act are clear, irreconcilable and appropriate for certiorari. See *McElroy v. United States*, 455 U.S. 642, 643 (1982).

Almost fifty years ago, Chief Justice Fred M. Vinson described the certiorari process. "The function of the Supreme Court, is, therefore, to resolve conflicts of

opinion on federal questions that have arisen among the lower courts, pass upon questions of wide import under the Constitution, laws and treaties of the United States, and to exercise supervisory power over lower federal courts."[4] The issue presented herein fits those words squarely. There is an irreconcilable difference as to an important issue of statutory interpretation concerning a relatively new piece of legislation with a potentially vast (and repetitive) impact. It is axiomatic that any federal court that will handle a WARN case in the future will undoubtedly consider whether calendar-days or work-days is the appropriate method for calculating damages. Accordingly, review of this issue by this Court is paramount.

CONCLUSION

For all the foregoing reasons, Petitioner respectfully requests that the writ should be granted.

Respectfully submitted,

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Dated: June 7, 1996

[4] Address to the American Bar Association, September 7, 1949, 69 S. Ct. VI (1949).

APPENDIX A

Filed March 11, 1996

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 95-7191

MARIE A. KALWAYTIS; PEGGY JACKSON; LYDIA T. HREBEN; SHIRLEY MUSTICH,

Appellees

v.

PREFERRED MEAL SYSTEMS, INC.,

Appellant

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

(D.C. No. 93-cv-00371)

Argued January 10, 1996

Before: SCIRICA, ALITO, and WEIS, *Circuit Judges.*

Filed: March 11, 1996

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OPINION OF THE COURT

WEIS, *Circuit Judge.*

In this WARN Act case, the principal issue is the amount of damages payable to employees who were on seasonal layoff at the time the employer announced what amounted to a permanent layoff. The workers received letters sent less than the 60 days required by the statute before the permanent layoff began. The district court awarded damages for 60 days, as if no notice had been sent. We conclude that the notice was untimely, and that the violation period began on either the day each employee reasonably expected to return to work after the seasonal break or the permanent layoff date set by the employer, whichever was earlier. Accordingly, we will remand for a recalculation of damages.

Plaintiffs are former employees of Preferred Meal Systems, Inc., which prepared pre-packaged meals for schools at a plant in Moosic, Pennsylvania. Because of the seasonal nature of its business, the company had a practice of laying off employees during schools' summer vacation months. In May and June 1992, eighty-five of Preferred's approximately 124 employees began their summer layoffs.

On June 26, 1992, the company sent a letter to the employees advising them that "[o]n August 1, 1992," it would be "ceasing direct food service employment" at the Moosic plant, and "laying off its food service employees." "This letter is your notice of layoff as of August 1, 1992." Noting that this was "the normal time" when "seasonal lay-offs would occur," the letter explained that in the future, Preferred would "contract with Culi-Services, Inc. to provide food service employees at this location." The letter continued, "Culi-Services, Inc. has an immediate offer of employment to make to you. If you are interested . . . you must contact them directly."

On the same day, Culi sent a communication to the Preferred employees informing them that it would be "recruiting" for certain positions. Culi also placed ads in the local newspapers seeking applicants for the jobs. Culi's announced wages were lower than those Preferred had paid for the same work.

In a letter dated July 10, 1992, Preferred wrote again to its employees, stating:

> "The June 26 letter may have incorrectly conveyed the impression that Culi-Services, the new employer, has an offer of employment to make to you. We are sorry for any confusion this letter may have created, but Culi-Services does *not* have an offer of employment for you at this time. Any offer of employment will depend upon your application and Culi Services discretionary judgement as to the best applicants available for the limited number of positions available."

Preferred ultimately retained a small number of its employees and Culi hired some, but not all, of the remainder.

Plaintiffs, consisting of a class of sixty-nine former Preferred employees, filed a complaint against the company, asserting a failure to give them 60 days notice of the mass layoff as required by the Worker Adjustment and Retraining Notification Act (WARN), 29 U.S.C. §§ 2101-2109. Preferred defended on the basis that it was a "joint employer" with Culi. Preferred also contended that the time between the seasonal layoff in May and the sub-contracting with Culi in late June 1992 should not be considered as a WARN Act violation period.

Finding that the size of the work force at Moosic and the number of employees affected brought the matter within the scope of the WARN Act, the district court granted summary judgment to the plaintiffs and awarded damages in the amount of $253,337.43. The court rejected Preferred's joint employer defense, observing that the WARN Act did "not define the term 'employer' to encompass separate business entities which enjoy a simple contractual relationship to produce the goods previously produced by one of the entities." The court also held that the plaintiffs' expectations of returning to employment with Preferred were destroyed on June 26, 1992, when the temporary layoff became permanent. Accordingly, because they had not received a notice 60 days before that date, the plaintiffs were entitled to 60 days wages.

Preferred has appealed, reiterating its joint employer contention and also asserting that the damages should be

recalculated because the plaintiffs would have been unemployed in any event during the summer season.

I.

Preferred's joint employer defense is based on the proposition that if the number of employees who took positions with Culi is taken into account, the threshold number of employees required to bring the WARN Act into play, 29 U.S.C. § 2101(a)(2), is not met. As Preferred sees it, if it and Culi are considered as a single enterprise, when eighty-five employees were laid off and fifty-four were re-employed by Culi, less than the statutory minimum of fifty employees were adversely affected. *See* 29 U.S.C. § 2101(a)(6).

Preferred's only evidence that a joint employment relationship existed is that a union, attempting to secure an election at the Moosic plant, contended in a July 1993 letter to the National Labor Relations Board that Preferred was a joint employer with Culi. Apparently, that case has not been resolved and its *res judicata* effect, if any, is not before us. Nor need we consider whether there is a distinction between the policies established by the National Labor Relations Act, with respect to various employer alignments, and situations arising under the WARN Act. *See United Steelworkers of America v. Crown Cork & Seal Co.*, 32 F.3d 53, 59 (3d Cir. 1994), *aff'd* 115 S. Ct. 1927 (1995) (noting "vast" policy differences). The union's bare contention is simply not an adequate basis for a finding on the issue in the case before us.

Similarly, because of the lack of any factual development, we need not explore the analogies that Preferred

relies upon in its citation of *Headrick v. Rockwell Int'l Corp.*, 24 F.3d 1272 (10th Cir. 1994) and *International Alliance of Theatrical and Stage Employees v. Compact Video Services, Inc.*, 50 F.3d 1464 (9th Cir. 1995). Those cases discussed the sales of businesses and the continuation of employment.

In the summary judgment context here, Preferred had the burden of producing evidence to support its claim of joint employment. It did not do so, and consequently, the district court did not err in rejecting that defense.

II.

The second issue raised by Preferred is the damages assessment. Although not sharply delineated by the parties, we see the point in dispute to be the district court's determination that the employment relationship ended on June 26, 1992, when the first letter was sent, and that 60 days pay was due beginning on that day. Preferred contends that the layoffs beginning in May and early June were customary and anticipated by the affected workers. Consequently, the argument goes, when they left for the summer, the employees had no expectation of working until the autumn, and calculation of WARN damages should take into account the customary recall date in late August or early September.

29 U.S.C. § 2102(a) provides:

> "An employer shall not order a plant closing or mass layoff until the end of a 60-day period after the employer serves written notice of such an order –

> . . . to each affected employee . . . and to the State dislocated worker unit . . . and [to] the chief elected official of the unit of local government within which such closing or layoff is to occur."

An employer failing to notify the governmental units is subject to a civil penalty. 29 U.S.C. § 2104(a)(3). Preferred did not file a report with the appropriate governmental units, but no claims for the civil penalties are presented here. Moreover, they are severable from those asserted by the employees. We will therefore not consider the civil penalties further.

Section 2104(a)(1) provides that an employer who orders a "mass layoff" in violation of the notice provision is "liable to each aggrieved employee who suffers an employment loss" as the result of such layoff for "back pay for each day of violation" and for employee benefits as well. In *United Steelworkers of America v. North Star Steel Co.*, 5 F.3d 39, 43 (3d Cir. 1993), we concluded that "WARN uses the term 'back pay' simply as a label to describe the daily rate of damages payable." Hence, that case establishes the upper limit of damages applicable here as 60 calendar days wages. *Contra Frymire v. Ampex Corp.*, 61 F.3d 757, 771-72 (10th Cir. 1995) (damages calculated on number of working days lost during the violation period); *Carpenters Dist. Council v. Dillard Dep't Stores, Inc.*, 15 F.3d 1275, 1286 (5th Cir. 1994) (same). Because the termination date of employment was not pertinent in North Star Steel, we did not address the point and that case does not control the resolution of the issue here.

The statute defines "mass layoff" as a reduction in force which "results in an employment loss." 29 U.S.C. § 2101(a)(3)(B). "Affected employees" are those "who may reasonably be expected to experience an employment loss as a consequence of a proposed . . . mass layoff." 29 U.S.C. § 2101(a)(5). Thus, an employer is liable when it fails to give notice of a mass layoff that may be expected to cause a work loss to employees.

Also pertinent to this case is 29 U.S.C. § 2102(c), which states: "A layoff of more than 6 months which, at its outset, was announced to be a layoff of 6 months or less shall be treated as an employment loss . . . " unless the extension is caused by unforeseeable business circumstances and notice is given when it becomes reasonably foreseeable that the layoff will extend beyond six months.[1]

A. When Did Employees Suffer a "Work Loss?"

It appears that as of June 25, 1992 (the day before the first letter), the employees, who were then in the usual summer status, had no reasonable expectation of working for Preferred until the end of the seasonal layoff in the fall of 1992. The summer shutdown in prior years did not cause compensable work losses under the WARN Act. It

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[1] The district court rejected Preferred's assertions that the layoff extension was not foreseeable. We find no basis to disturb that ruling on this record. 29 U.S.C. § 2102(c) establishes a basis for finding liability on the part of Preferred, but it provides no guidance on the date the employment loss began or on the measure of damages as discussed in Parts A and C, *infra*.

was the conversion of the seasonal layoff into a permanent one that constituted the triggering event, which required Preferred to give notice.

The difference between the situation in 1992 and that of former years was that the workers would not be returning to their regular jobs at the usual time, but instead would be on indefinite layoff as of August 1, 1992. At that point, further employment was no longer available, just as in the more common situation when persons steadily employed throughout the year are removed from a company's payroll on a specified date.

The letter of June 26, 1992 stated that the layoff was effective on August 1, 1992. This is inconsistent with Preferred's argument, which instead would have us look to the date in September when the seasonal layoffs usually ended. We believe that Preferred should be held to the terms in its letter. Moreover, Preferred treated the workers as "former employees" as of August 1, 1992 in connection with termination of benefits coverage, including health insurance.

The starting point of the violation period, therefore, should be August 1, 1992 (the day specified in the employer's notice) unless based on Preferred's previous recall practice, an employee reasonably expected to be recalled before that date.

B. When Was Notice Given?

We must also consider whether the letters sent by Preferred qualified as notice under the WARN Act. Pursuant to statutory direction, *see* 29 U.S.C. § 2107, the

Secretary of Labor promulgated regulations governing the content of the notice. The regulations do not specify the use of a special form, but they do require that certain information be included in understandable language. The notice should tell the employees whether the planned action is to be permanent or temporary; the expected date when the layoff will begin; when the individual employees will be separated; when bumping rights exist; and the name and telephone number of a company official who may be contacted. 20 C.F.R. § 639.7(d).

Flexibility in the notice requirement, however, is recognized by the provision that the notice is to be based on the best information available to the employer at the time the notice is served. "It is not the intent of the regulations, that errors in the information provided in a notice that occur because events subsequently change or that [ ] minor, inadvertent errors are to be the basis for finding a violation of WARN." 20 C.F.R. § 639.7(a)(4).

Fairly read, the regulations require a practical and realistic appraisal of the information given to affected employees. We therefore examine the correspondence sent to the employees to determine if it provided adequate notification of the mass layoffs.

The recipients of Preferred's letters could reasonably assume that they would suffer an employment loss. The June 26, 1992 letter, however, was ambiguous about the employees' future prospects with Culi. Preferred recognized this problem and clarified the lack of guaranteed employment with Culi in its letter of July 10, 1992.

Giving a reasonably pragmatic interpretation of the two letters, we conclude that, read together, they do meet

the statutory requirements of notice. However, because the ambiguity in the first letter was not resolved until July 10, 1992, that later date should be the effective date of the notice.

C. Damages Calculation

In *Dillard Dep't Stores*, the Court of Appeals said "[t]he violation period is comprised only of those 'days after the shutdown or layoff in violation of [the WARN Act] and extends for the number of days that notice was required but not given.' " 15 F.3d at 1286 (citing H.R. Conf. Rep. No. 576, 100th Cong., 2d Sess. 1052 (1988), *reprinted in* 1988 U.S.C.C.A.N. 2078, 2085). Further, the Court commented that if an employee was actually terminated within the 60 day notice period "such that the employee actually received less than the full sixty days notice, then the violation period would range from the actual date of termination until the end of the sixty-day notice period." *Id.* at 1286-87.

We agree with the reasoning of the *Dillard* court. It is the date when the employment loss could be expected to occur that marks the starting point, not the date on which the employee learns that a loss will occur in the future. Ordinarily, the starting point will be the end of the seasonal layoff, but here, Preferred set the date by stating in its letter that the work loss would commence on August 1st.[2]

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[2] Because of the timing of Preferred's notice, employees may receive what might, in other circumstances, be regarded to some extent as a "windfall" by obtaining wages for days they otherwise would have been on seasonal layoff. As we noted

Preferred's notice period began on July 10, 1992 and the 60 calendar days needed to avert a violation would extend to September 8, 1992. Because the indefinite layoff began on August 1, the employees therefore would be entitled to damages for thirty-nine calendar days (August 1 to September 8). If, however, any employee reasonably expected his or her seasonal recall to end before August 1, additional damages would be due so as to account for the full 60 days period. For example, a worker whose seasonal layoff would have ended on July 29 would be entitled to forty-one days. This method of calculation is consistent with the purpose Congress had in mind when it enacted the WARN Act. The regulations capture the spirit of the legislation in stating that the 60 day notice "provides workers and their families some transition time to adjust to the prospective loss of employment, to seek and obtain alternative jobs" or to obtain training for further employment. *See* 20 C.F.R. § 639.1.

By using the formula adopted here, employees who were not actually working when the layoff extension was imposed receive the same amount of time to seek employment and make the necessary adjustments as workers who were on the job at the time the indefinite layoff was imposed. In the only published opinion in which an analogous situation was presented, a district court came to a similar conclusion. *See Marques v. Telles Ranch, Inc.*, 867 F. Supp. 1438 (N.D. Cal. 1994).

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earlier, however, Preferred selected the date as August 1 and employee benefits were phased out as of that date.

Accordingly, the order of the district court holding Preferred liable under the WARN Act will be affirmed. The case will be remanded to the district court for recalculation of the damages due under the Act in accordance with this Opinion.

A True Copy:

Teste:

Clerk of the United States Court of Appeals
for the Third Circuit

APPENDIX B

IN THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

MARIE A. KALWAYTIS; PEGGY JACKSON; LYDIA T. HREBEN; and SHIRLEY MUSTICH,	:	
Plaintiffs	:	
vs.	:	**NO. 3:CV-93-371**
PREFERRED MEAL SYSTEMS, INC., a Delaware Corporation,	:	**JUDGE VANASKIE**
Defendant	:	**(Filed Dec. 9, 1994)**

MEMORANDUM

This action concerns alleged violations of the Worker Adjustment and Retraining Notification Act of 1988, 29 U.S.C. § 2101, *et seq.* (hereafter "WARN"), which, *inter alia,* requires that an employer to whom WARN applies provide employees with sixty-days advance notice prior to a plant closing or mass layoff. Plaintiffs consist of a class of sixty-nine (69) former employees of Defendant Preferred Meal Systems, Inc. ("Preferred"), who were separated from their employment with Preferred during a thirty-day period between May and June of 1992. (*See* Dkt. Entry # 39 at 3.) Currently pending are cross motions for summary judgment. (Dkt. Entry nos. 38 and 45.) The controlling issue is whether WARN allows Preferred to avoid liability for failing to provide notice to the class members because Culi-Services, Inc. ("Culi"), with whom Preferred contracted to provide prepackaged meals, hired thirty-two (32) of Preferred's terminated employees. (Dkt.

Entry # 46 at 3.) Because an employer may not avoid liability under WARN when some of its terminated employees are hired by a company with whom the employer contracted to produce the employer's products, Preferred's motion for summary judgment will be denied and Plaintiffs' motion for summary judgment will be granted.[1]

I. Factual Background

Prior to the summer of 1992, Preferred operated a plant at Moosic, Pennsylvania, where it prepared pre-packaged meals for schools.[2] Preferred employed approximately 124 employees at the plant. Due to the nature of its business of providing goods or services to schools, Preferred laid off employees during the summer months.

During a thirty-day period between May and June of 1992, Preferred separated 84 plant employees from their employment. Preferred did not provide the employees with notice prior to termination. The instant plaintiff class representatives were among those terminated.

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[1] Plaintiffs also filed a "Motion To Strike Improper Materials Submitted by Defendant In Support of Its Motion For Summary Judgment" (Dkt. Entry # 54), which will be denied as moot in light of the grant of Plaintiffs' motion for summary judgment.

[2] In accordance with Local Rule 7.4, Plaintiffs filed a statement of uncontested facts with its motion for summary judgment. (Dkt. Entry # 40.) Because Preferred did not file a "statement of material facts, responding to" Plaintiffs' statement, Plaintiffs' material facts are "deemed to be admitted." Local Rule 7.4. This factual background is drawn heavily from those admitted, material facts.

In a June 26, 1992 form letter Preferred delivered to each terminated employee, Preferred's President, Daniel R. Krpan, stated:

> On August 1, 1992, Preferred Meal Systems will be ceasing direct food service employment for the operation at its Moosic facility and laying off its food service employees. This letter is your notice of lay-off as of August 1, 1992.
>
> This is the normal time when Preferred Meal Systems seasonal lay-offs would occur at this facility, but in the future, Preferred Meal Systems will contract with Culi-Services, Inc. to provide food service employees at this location. Culi-Services, Inc. has an immediate offer of employment to make to you. If you are interested in employment with Culi-Services, Inc. you must contact them directly at 301/762-9786 after July 1, 1992. [Dkt. Entry # 42 at Ex. "5."]

Culi also sent a form letter dated June 26, 1992, to the terminated employees. In that letter, Culi's President, David Schek, stated:

> Preferred Meal Systems has contracted with Culi-Services to provide food service employees for its Moosic facility. Culi-Services has been in the business since 1988 and specializes in recruiting and employing food service workers. Culi-Services will be recruiting for the following positions and will offer the following wages for these positions:

Position	Wage Per Hour
1. Assembler	$4.85
2. Warehouse	$5.50
3. Line Support # 1	$6.00
4. Line Support # 2	$7.00

> The Culi-Service's personnel recruiter serving the Moosic facility will begin accepting applications and interviewing for these positions on or abut [sic] July 6, 1992. Please contact my assistant, after July 1 at (301) 762-9786 to arrange a specific date and time for an interview if you wish to apply with Culi-Services. [Dkt. Entry # 50 at 2.][3]

It is undisputed that the wages Culi offered were lower than those paid by Preferred. (*See* Dkt. Entry # 50 at 3-4.) For instance, while Culi offered $4.85 per hour to an assembler, Preferred previously paid $8.20 per hour – a wage reduction of nearly sixty percent. (*See Id.*)[4]

Although Krpan, Preferred's President, stated in his June 26, 1992 form letter that Culi "has an immediate offer of employment to make to you," Krpan changed his position in a July 10, 1992 letter delivered to the terminated employees. The July 10th letter stated:

> You recently received a letter from me dated June 26, 1992, advising you that Preferred Meal Systems was ceasing direct food service employment for the operation at its Moosic facility and laying off its food service employees. That letter served as notice of layoff.

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[3] Culi also placed advertisements in Scranton newspapers seeking applicants for the positions it was to fill in Preferred's plant. (Dkt. Entry # 51 at Ex. "C" and ¶¶ 16 and 17.) In addition, "help-wanted" signs were posted in front of Preferred's plant. (Dkt. Entry # 51 at ¶ 18.)

[4] Plaintiff class members also participated in a group health plan, life insurance plan, and 401(k) retirement plan while employed by Preferred. (Pl.s' Exs. Supp. Mot. Summ. J. at 8.)

> The June 26 letter may have incorrectly conveyed the impression that Culi-Services, the new employer, has an offer of employment to make to you. We are sorry for any confusion this letter may have created, but Culi-Services does *not* have an offer of employment for you at this time. *Any offer of employment will depend upon your application and Culi-Services [sic] discretionary judgement as to the best applicants available for the limited number of positions available.*
>
> If you are interested in employment with Culi-Services, Inc., you must contact them directly at 301/762-9786, after July 1, 1992. [Dkt. Entry # 42 at Ex. "6," emphasis in original and added.]

Preferred ultimately rehired 15 of the 84 terminated employees; Culi hired 32 of the remaining 69 employees. (Dkt. Entry # 46 at ¶ 8.)[5]

II. Procedural History

Plaintiffs initiated this action on March 15, 1993. (Dkt. Entry # 1.) Plaintiffs' motion to certify the class was granted on August 27, 1993. (Dkt. Entry # 17.) Plaintiffs' and Preferred's motions for summary judgment were filed on March 9, 1994 (Dkt. Entry # 38), and April 6, 1994 (Dkt. Entry # 45), respectively. Briefing is complete with respect to both motions, and oral argument on the motions was heard on September 23, 1994.

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[5] Although Preferred provides only an unverified list of the employees it contends it rehired and Culi hired, the Court accepts the veracity of the list in considering the instant motions.

III. Discussion

Rule 56(c) of the Federal Rules of Civil Procedure provides that summary judgment should be granted when "there is no genuine issue as to any material fact and . . . the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). The underlying material facts are not in dispute. The controlling issue is whether WARN allows Preferred to avoid liability for WARN violations based upon a "joint employer" defense because Culi ultimately hired thirty-two of Preferred's terminated employees.[6]

WARN applies to an employer of at least one hundred employees and requires that the employer provide sixty days notice before a "mass layoff" or "plant closing." 29 U.S.C. §§ 2101(a) and 2102(a); *Moore v. Warehouse Club., Inc.*, 992 F.2d 27, 29 (3rd Cir. 1993).[7] A plant closing is a:

> permanent or temporary shutdown of a single site of employment . . . if the shutdown results in an *employment loss* at the single site of employment during any 30-day period for *50 or*

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[6] Borrowing Preferred's own designation, this argument is referred to as a "joint employer" defense.

[7] Concerning the requirement that the employer employ at least 100 employees, 29 U.S.C. §2101(a)(1) states:

[T]he term "employer" means any business enterprise that employs –

> (A) 100 or more employees, excluding part-time employees; or
>
> (B) 100 or more employees who in the aggregate work at least 4,000 hours per week (exclusive of hours of overtime)

> *more employees* excluding any part-time employees. 29 U.S.C. § 2101(a)(2) [emphasis added].

A "mass layoff" occurs, for purposes of the instant case, when at least 50 employees, which constitute at least thirty-three percent of the employer's work force at the single site of employment, suffer an "employment loss."[8] An employment loss is either a layoff exceeding six months or "an employment termination," which does not include "a discharge for cause, voluntary departure, or retirement." 29 U.S.C. § 2102(a)(6).

WARN "serves very broad societal goals – to protect workers, their families and their communities in the wake of potentially harmful employment decisions." *United Steelworkers of America v. Crown Cork & Seal Co., Inc.*, 32 F.3d 53, 58 (3rd Cir. 1994). Like all remedial statutes, WARN should be liberally construed to effectuate its purpose. *Washington*, 831 F.Supp. at 1295; *Solberg v. Inline Corp.*, 740 F.Supp. 680, 684 (D.Minn. 1990).

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[8] 29 U.S.C. §2101(a)(3) states:

> [T]he term "mass layoff" means, in pertinent part, a reduction in force which –
>
> (A) is not the result of a plant closing; and
>
> (B) results in an employment loss at the single site of employment during any 30-day period for –
>
> (i)(I) at least 33 percent of the employees (excluding any part-time employees); and
>
> (II) at least 50 employees (excluding any part-time employees.

The following facts are uncontested: Preferred employed in excess of one hundred employees; it terminated more than fifty employees, which constituted in excess of thirty-three percent of its work force at its Moosic plant; and it failed to give those employees 60 days prior written notice. At oral argument, Preferred conceded that if there is no "joint employer" defense under WARN, then Preferred's failure to provide notice to its terminated employees violated WARN.

Preferred asserts that the employees it "seasonally laid off . . . were offered employment by Culi in the same positions, doing the same work, at the same locations as had been previously performed when the individuals were employed" by Preferred. (Dkt. Entry # 46 at ¶ 7.)[9] Preferred argues that because Culi and it operated as a "joint employer" to provide a continuity of employment to Plaintiffs, they "were in fact re-employed within 6 months of the seasonal lay-off" by Culi so that Preferred did not cause a "mass lay off" or "plant closing" within the meaning of WARN.[10] Plaintiffs argue that WARN

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[9] Concerning its contract with Culi, Preferred stated: "Culi interviewed the former employees of Defendant and hired an agreed portion of them as the employees to work at the Moosic Plant." (Dkt. Entry # 47 at 3.) It does not appear, however, that Preferred made its contract with Culi part of the record in this matter.

[10] Although Preferred acknowledges that all of the terminated employees were not re-employed or offered employment by Culi after the termination, Preferred asserts that a sufficient number of terminated employees were re-employed so that WARN was not triggered.

does not insulate Preferred from liability simply because Culi hired a number of Preferred's employees.

"The task of resolving the dispute over the meaning of [a statute] . . . must begin with the language of the statute itself." *United Steelworkers of America v. North Star Steel Co.*, 5 F.3d 39, 41 (3rd Cir. 1993), *cert. denied*, 114 S.Ct. 1060 (1994). WARN defines the term "employer" to mean "any business enterprise that employs . . . 100 or more employees, excluding part-time employees," or "100 or more employees work in the aggregate at least 4,000 hours. . . . " 29 U.S.C. § 2101(a)(1). WARN does not define the term "employer" to encompass separate business entities which enjoy a simple contractual relationship to produce the goods previously produced by one of the entities, such as the contractual relationship between Preferred and Culi. " 'A fundamental canon of statutory construction is that, unless otherwise defined, words will be interpreted as taking their ordinary, contemporary, common meaning.' " *Moore*, 992 F.2d at 29. The common, ordinary meaning of the words Congress employed cannot be construed to create a "joint employer" defense.

It is also significant that explicit exceptions to WARN's primary provisions do not include a "joint employer" concept. WARN provides two exceptions to its notification requirements: (a) the closing of a temporary facility or the hiring of employees with the understanding that their employment was limited in duration, 29 U.S.C. § 2103(1); and (b) when "the closing or layoff constitutes a strike or constitutes a lockout not intended to evade" WARN's requirements. 29 U.S.C. § 2103(2). WARN also provides two exceptions from the definition of "employment loss": when employees are transferred

from one company to another because of a sale, 29 U.S.C. § 2101(b)(1); *see Headrick v. Rockwell Intern. Corp.*, 24 F.3d 1272, 1280 (10th Cir. 1994); and when the employer relocates or consolidates its business and offers the employee the opportunity to transfer, provided that other particular statutory requirements are met, 29 U.S.C. § 2101(b)(2).[11] Thus, although WARN may apply on its face to a given case, Congress sought to explicitly exclude from liability these four circumstances. In light of Congress' willingness to provide specific exceptions to WARN's coverage,

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[11] 29 U.S.C. § 2101(b), in pertinent part, provides:

> (1) In the case of a sale of part or all of an employer's business, the seller shall be responsible for providing notice for any plant closing or mass layoff . . . up to and including the effective date of the sale. After the effective date of the sale of part or all of an employer's business, the purchaser shall be responsible for providing notice for any plant closing or mass layoff. . . .
>
> (2) [A]n employee may not be considered to have experienced an employment loss if the closing or layoff is the result of the relocation or consolidation of part or all of the employer's business and, prior to the closing or layoff –
>
> > (A) the employer offers to transfer the employee to a different site of employment within a reasonable commuting distance with no more than a 6-month break in employment; or
> >
> > (B) the employer offers to transfer the employee to any other site of employment regardless of distance with no more than a 6-month break in employment, and the employee accepts within 30 days of the offer or of the closing or layoff, whichever is later.

WARN cannot be interpreted as establishing by implication a "joint employer" defense. *See U.S. ex rel. Williams v. NEC Corp.*, 931 F.2d 1493, 1502 (11th Cir. 1991) ("where a statute explicitly enumerates certain exceptions to a general grant of power, courts should be reluctant to imply additional exceptions in the absence of a clear legislative intent to the contrary"). Moreover, the requirement that WARN be construed liberally to effectuate its beneficent purposes militates against recognition of an *implicit* "joint employer" defense.

In asserting its argument, Preferred borrows this "joint employer" concept from cases involving the National Labor Relations Act ("NLRA"). Under the NLRA, whether "joint employer" status exists:

> [I]s rather a matter of determining which of two, or whether both, respondents control, in the capacity of employer, the labor relations of a given group of workers. The basis of the finding is simply that one employer while contracting in good faith with an otherwise independent company, has retained for itself sufficient control of the terms and conditions of employment of the employees who are employed by the other employer. Thus, the "joint employer" concept recognizes that the business entities involved are in fact separate but that they share or codetermine those matters governing the essential terms and conditions of employment. *N.L.R.B. v. Browning-Ferris Industries*, 691 F.2d 1117, 1123 (3rd Cir. 1982).

The argument that joint employer status exists is often asserted by plaintiffs to a suit; for instance, by discharged truck drivers seeking to have a trucking company and its

trucking brokers, the joint employers, reinstate them, *id.* at 1119, or by a union seeking a determination that two separate employers are joint employers so that the representative election requested by the union would encompass a larger number of employees, *Boire v. Greyhound Corp.*, 376 U.S. 473 (1964). None of the cases on which Preferred relies, however, or the authority on which those cases are based, uses a "joint employer concept" to insulate an employer from liability, as Preferred attempts to do here. Indeed, Preferred cites no authority holding that such a "joint employer" argument can be relied upon in a defensive manner even in the NLRA context. *A fortiori*, it is not available here.

Our Court of Appeals in *United Steelworkers of America, AFL-CIO-CLC v. Crown Cork & Seal Co.*, 32 F.3d 53, 59 (3rd Cir. 1994), while acknowledging that a "superficial resemblance between the NLRA and WARN" could exist in some circumstances, stated that a "fundamental distinction [existed] between the two statutes." As the court explained:

> The rights bestowed by the NLRA focus solely on the need for a meaningful collective bargaining process; WARN provides an across-the-board substantive right. The implementing regulations of the statute highlight this crucial distinction by providing that '[c]ollective bargaining agreements may be used to clarify or [to] amplify the terms and conditions of WARN, but *may not reduce WARN rights.*' 20 C.F.R. § 639.1(g) (emphasis added). In other words, the NLRA requires notice to protect the meaningfulness of the collective-bargaining process;

> WARN's purpose is to substantively protect employees and their communities. *Id.* at 58-59.

Based upon this fundamental distinction, the court held that the most closely analogous state statute of limitations, rather than the six-month statute of limitations for filing an unfair labor practice claim set for [sic] in the NLRA, applied to WARN actions. The Third Circuit's rationale compels the conclusion that WARN and the NLRA cannot be read *in pari materia*. Just as our Court of Appeals determined that the NLRA's six month limitations period should not govern the assertion of WARN's substantive rights, NLRA's "joint employer" concept should not be used to defeat those rights.

To hold otherwise could undermine WARN's salutary purpose. For instance, an employer's decision to no longer employ its work force and to engage an independent contractor, surely a more common occurrence in today's business world, most definitely is a "potentially harmful employment decision" from which Congress intended WARN "to protect workers, their families and their communities." *United Steelworkers*, 32 F.3d at 58.[12] Regardless of whether the independent contractor will have job openings for which people may apply, the fact of

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[12] Preferred terminated its employees in order to pay an independent contractor to provide the services Preferred received from those employees. Because Preferred no longer would pay retirement benefits and insurance premiums on behalf of those employees, and because the independent contractor was to pay its newly hired employees significantly lower wages than Preferred, it is likely that Preferred would enjoy a cost savings by using an independent contractor, which helps to explain the attractiveness of such a decision.

the matter remains that the employer terminated the employees. Congress enacted WARN so that the affected employees would receive notice of the termination. Such a construction is required in order to effectuate WARN's purpose. *See Washington*, 831 F.Supp. at 1295; *Solberg*, 740 F.Supp. at 684.

In arguing that business entities related to the "employer" can themselves be considered an "employer" by reason of that relationship, Preferred relies upon *Cruz v. Robert Abbey, Inc.*, 778 F.Supp. 605 (E.D.N.Y. 1991).[13] In *Cruz*, terminated employees, proceeding pursuant to WARN, sued the manufacturer that terminated them and a "John Doe Company," alleging that the John Doe Company "is and has been . . . the alter ego, joint employer and successor employer, and successor to and assignee and agent of" the manufacturer. 778 F.Supp. at 608. The *Cruz* court quoted the following regulations promulgated by the Department of Labor pursuant to WARN:

> Under existing legal rules, independent contractors and subsidiaries which are wholly or partially owned by a parent company are treated as separate employers or as part of the parent or contracting company depending upon the

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[13] Preferred argues that because counsel for Plaintiffs, while representing a different party before the National Labor Relations Board, "stated that the record in the National Labor Relations Board hearing established that Preferred Meals, the Defendant, 'is a joint employer along with . . . Culi,' " Plaintiff's attorney should be precluded from taking a contrary position here." (Dkt. Entry # 47 at 8-9.) Because preclusion acts to estop a party and not the party's counsel from asserting a position, it is inapplicable here. *Ramey v. Rockefeller*, 348 F.Supp. 780, 785 (E.D.N.Y. 1972) (Friendly, J.).

> degree of their independence from the parent. Some of the factors to be considered in making this determination are (i) common ownership, (ii) common directors and/or officers, (iii) de facto exercise of control, (iv) unity of personnel policies emanating from a common source, and (v) the dependency of operations. *Id.* at 609; *see* 20 C.F.R. § 639.3.

The court held that the complaint's allegations survived a Rule 12(b)(6) motion, because the Court had to assume the allegations to be true. *Id.* at 609.

Preferred, however, does not contend that Culi and it were wholly or partially owned by a parent company. Neither does Preferred contend that Culi and it have common officers or a dependency of operations. The facts of this case simply are different than those in *Cruz* so that its holding does not allow Preferred to argue that Culi was its joint employer or alter ego to avoid liability for WARN violations.

Preferred also contends that the opinion of retired Supreme Court Justice Byron R. White sitting by designation in *Headrick v. Rockwell Intern. Corp.*, 24 F.3d 1272 (10th Cir. 1994), supports its position. In *Headrick*, the U.S. government entered into a three-way agreement involving Rockwell International Corporation ("Rockwell"), the contractor operating its Rocky Flats base, and EG & G Rocky Flats, Inc. ("EG & G"), the contractor who was to overtake the operations of the base. 24 F.3d 1273-74. The employees working at Rocky Flats were assured prior to the transfer that EG & G "would retain all employees under the same terms and conditions they enjoyed with" Rockwell. *Id.* at 1274. Despite the transfer of operations to

EG & G, no Rockwell employee "lost a single day's wages or any accrued seniority." *Id.*

The district court found that the employees did not suffer an "employment loss" because "Congress never intended the Act to cover a 'termination' as ephemeral as this; rather, . . . Congress meant 'employment loss' to cover only employees truly idled or deprived of income." *Headrick*, 24 F.3d at 1280. In also finding that no WARN violation occurred, Justice White relied upon 29 U.S.C. § 2101(b)(1), the provision Congress placed in WARN to provide that employees transferred between companies because of a sale of part or all of an employer's business do not suffer a remediable "employment loss." *Id.* at 1280.

Preferred contended during oral argument that Preferred's "employees were kept" by Culi in the same manner that the third contractor retained the employees in *Headrick*. Preferred's argument, however, does not gain authority from Justice White's holding. His analysis relied on 29 U.S.C. § 2101(b)(1), which is inapplicable here since Preferred effected no sale or transfer of its business to Culi.

While Preferred's argument draws more from the *Headrick* lower court rationale, the facts of this case are far different. The district judge's finding there was premised upon his belief that the termination of the employees was "only a 'technical' one since appellants were rehired at full pay by [the third contractor] just a 'millisecond' after their termination by Rockwell." *Id.* at 1279. In this case, on the other hand, even those employees rehired by Culi were idled for a period of time before they resumed working. Moreover, no terminated Preferred employee

was guaranteed a position with Culi; each had to competitively interview for a job. Finally, Culi did not present the terminated Preferred employees the possibility of receiving "full pay."

As the above discussion demonstrates, WARN does not provide a "joint employer" defense and neither the *Cruz* nor *Headrick* decisions support Preferred's position. Thus, summary judgment in favor of Plaintiffs is appropriate.

As noted above, Preferred did not respond to "Plaintiffs' Statement Of Uncontested Facts In Support Of Their Motion For Summary Judgment Pursuant To Local Rule 7.4." (Dkt. Entry # 40.) The facts thus are deemed admitted. Plaintiff's Statement notes the specific amount of damages for each class member, but does not address the amount of pre-judgment interest that should be awarded. Both parties will be afforded an opportunity to address this issue during a hearing which is scheduled for December 21, 1994, at 10:00 a.m.[14] An appropriate order is attached.

/s/ Thomas I. Vanaskie
Thomas I. Vanaskie
United States District Judge

DATED: December 9, 1994

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[14] Since the specific amount of damages for each class member is deemed admitted, the parties may find that they can stipulate to the amount of pre-judgment interest which should be awarded, obviating a hearing.

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

MARIE A. KALWAYTIS; PEGGY JACKSON; LYDIA T. HREBEN; and SHIRLEY MUSTICH,	:	
Plaintiffs	:	
vs.	:	**NO. 3:CV-94-371**
PREFERRED MEAL SYSTEMS, INC., a Delaware Corporation,	:	**JUDGE VANASKIE**
Defendant	:	**(Filed Dec. 9, 1994)**

ORDER

NOW, THIS 9th DAY OF DECEMBER, 1994, for the reasons set forth in the accompanying Memorandum, **IT IS HEREBY ORDERED THAT:**

1. Plaintiffs' motion for summary judgement (Dkt. Entry # 38) is **GRANTED.**

2. Defendant's cross motion for summary judgment (Dkt. Entry # 45) is **DENIED.**

3. Plaintiffs' "Motion To Strike Improper Materials Submitted by Defendant In Support of Its Motion For Summary Judgment" (Dkt. Entry # 54) is **DENIED** as moot.

4. A hearing on the amount of pre-judgment interest to which Plaintiffs are entitled will be held on December 21, 1994, at 10:00 a.m.

/s/ Thomas I. Vanaskie
Thomas I. Vanaskie
United States District Judge

APPENDIX C

IN THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

MARIE A. KALWAYTIS; PEGGY JACKSON; LYDIA T. HREBEN; and SHIRLEY MUSTICH,	:	NO. 3:CV-93-371
	:	JUDGE VANASKIE
Plaintiffs	:	(Filed Mar. 1, 1995)
vs.	:	
PREFERRED MEAL SYSTEMS, INC., a Delaware Corporation,	:	
Defendant	:	

MEMORANDUM

Plaintiffs, proceeding as class representatives, are former employees of Defendant Preferred Meal Systems, Inc. ("Preferred"). Prior to the summer of 1992, Preferred operated a plant in Moosic, Pennsylvania, where it prepared prepackaged meals for schools. Because Preferred did not provide Plaintiffs with sixty-days advance notice prior to closing its plant in the summer of 1992, in violation of the Worker Adjustment and Retraining Notification Act of 1988, 29 U.S.C. § 2101, *et seq.* (hereafter "WARN"), Plaintiffs' motion for summary judgment was granted by an Order dated December 9, 1994. The Order left open the issue of the amount of pre-judgment interest to which plaintiffs may be entitled, which this Memorandum addresses.

This Memorandum also addresses a three-page letter dated January 4, 1995, submitted by Preferred's counsel

to the Court, urging that damages should either be eliminated or reduced. Preferred seems to contend that because Preferred notified the plaintiff class members of the plant closing during a seasonal layoff period, the class members actually received adequate advance notice of the loss of their jobs. Alternatively, Preferred argues that a discretionary reduction in the amount of liability, as authorized by 29 U.S.C. § 2104(a)(4), is warranted because Preferred had acted "in good faith."

The final issue addressed in this Memorandum is plaintiff's request for an award of attorneys' fees and expenses. Although Preferred does not contest either the hourly rate or the number of hours claimed by Plaintiffs' counsel, Preferred contends that because some class members had other earnings during the 60-day period of violation and since Preferred acted "in good faith," attorneys' fees should be denied.

The fact that Preferred effected a permanent termination of employment of the plaintiff class members while they were "temporarily" laid off does not eliminate or serve to mitigate Preferred's acknowledged violation. Nor has Preferred satisfied the criteria for a discretionary reduction in damages under 29 U.S.C. § 2104(a)(4). Preferred has also failed to establish that an award of counsel fees and expenses would be unjust under the circumstances presented here. Finally, I believe that an award of prejudgment interest at the Pennsylvania legal rate of 6% is appropriate, with interest accruing 60 days after June 26, 1992, the date on which Preferred effectively made permanent the termination of the class members' employment.

I. FACTUAL AND PROCEDURAL BACKGROUND

As held in the December, 9, 1994 Memorandum granting summary judgment to Plaintiffs, Preferred violated WARN when it separated 84 of its Moosic plant employees, including Plaintiffs, from their employment without sixty-days prior notice.[1] Although Preferred did not provide notice that complied with WARN, it did provide Plaintiffs with two letters. The first letter dated June 26, 1992, was delivered to each class member, who at that time was temporarily laid off. In that letter, Preferred's President, Daniel R. Krpan, stated:

> On August 1, 1992, Preferred Meal Systems will be ceasing direct food service employment for the operation at its Moosic facility and laying off its food service employees. This letter is your notice of lay-off as of August 1, 1992.
>
> This is the normal time when Preferred Meal Systems seasonal lay-offs would occur at this facility, but in the future, Preferred Meal Systems will contract with Culi-Services, Inc. to provide food service employees at this location. Culi-Services, Inc. has an immediate offer of employment to make to you. If you are interested in employment with Culi-Services, Inc. you must contact them directly at 301/762-9786 after July 1, 1992. [Dkt. Entry # 42 at Ex. "5."]

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[1] Indeed, Preferred conceded that if its "joint employer" defense (based on the fact that Culi-Services, Inc. ("Culi"), with whom Preferred contracted to provide prepackaged meals, hired thirty-two (32) of Preferred's terminated employees) was not sustained, Preferred's termination of its employees violated WARN.

In effect, the June 26th letter informed the class members that their temporary or "seasonal" lay off was permanent.[2]

Although Krpan stated that Culi "has an immediate offer of employment to make to you," Krpan changed his position in a July 10, 1992 letter, which stated:

> You recently received a letter from me dated June 26, 1992, advising you that Preferred Meal Systems was ceasing direct food service employment for the operation at its Moosic facility and laying off its food service employees. That letter served as notice of layoff.
>
> The June 26 letter may have incorrectly conveyed the impression that Culi-Services, the new employer, has an offer of employment to make to you. We are sorry for any confusion this letter may have created, but Culi-Services does *not* have an offer of employment for you at this time. *Any offer of employment will depend upon your application and Culi-Services [sic] discretionary judgement as to the best applicants available for the limited number of positions available.*
>
> If you are interested in employment with Culi-Services, Inc., you must contact them directly at 301/762-9786, after July 1, 1992. [Dkt. Entry # 42 at Ex. "6," emphasis in original and added.]

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[2] Culi also sent a form letter dated June 26, 1992, to the terminated employees. That letter invited the employees to interview for the positions they formerly held with Preferred. It also advised them of the wage schedule it would pay for the positions, which was substantially lower than Preferred's wage schedule.

In effect, the July 10th letter informed the class members that they were not assured of employment with Culi.

Plaintiffs initiated this action in March of 1993. Because Preferred represented early in the course of litigation that the primary issue was whether it served as a "joint employer" with Culi, the parties' discovery efforts, in large part, did not address matters now presented by Preferred in its January 4, 1995 letter request for reconsideration and subsequent reply brief. (*See* Dkt. Entry # 75 at 2-3; Dkt. Entry # 77 at 4-5; Dkt. Entry # 69 at 2.) After conducting discovery relevant to the "joint employer" issue, the parties filed cross-motions for summary judgment; Preferred asserted none of its current arguments for elimination or mitigation of liability.

Indeed, it was not until almost one month after Plaintiffs were awarded summary judgment, on January 4, 1995, that Preferred submitted its untimely letter request for reconsideration. *See* Local Rule 7.10 ("[A]ny motion for reconsideration . . . shall be filed within ten (10) days after the entry of the . . . order").[3] Preferred now contends that because the class members were on a "seasonal lay off" and did not anticipate returning to employment with Preferred until September, "the period between the seasonal lay-off in May and the sub-contracting with Culi Services (and the notice of that sub-contracting to

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[3] Plaintiffs challenge Preferred's letter request by arguing that it is untimely and that Preferred "waived its alleged affirmative defenses by not pleading them per F.R.C.P. 8(c)." (Dkt. Entry # 75 at 4 & 7) While these arguments are well-taken, Preferred's request for reconsideration will be rejected for lack of substantive merit, and not due to its procedural default.

employees in late June and July), should not be considered as a WARN Act violation period." (Dkt. Entry # 78 at 2-3.) Preferred also argues that "the damage measure period should not begin until the decision to sub-contract with Culi was made and should end when the notice was given to employees (by the two letters sent to them)." (*Id.* at 3.) To hold otherwise, Preferred asserts, "would, effectively, permit the plaintiff class to be awarded WARN Act Damages for a period in which they, under all other circumstances, would not have worked or be [sic] employed in any way." (*Id.*)

With regard to mitigation for "good faith," Preferred argued that (a) it believed that its "joint employer" status did not trigger WARN's provisions; (b) as soon as it knew that it would be subcontracting the work to Culi, it provided the June 26 letter to Plaintiffs; (c) as soon as it realized that the June 26 letter was misleading, it delivered the July 10, 1992 letter; and (d) the laid-off employees Culi hired continued to perform the same work they had performed with Preferred.

A conference was held on January 11, 1995, following which Plaintiffs were afforded an opportunity to file an opposition brief to Preferred's request for reconsideration. An opposition brief was filed on January 23, 1995. (Dkt. Entry # 75.) Plaintiffs also were granted five (5) days within which to file a brief in support of their request for attorneys' fees, which they filed on January 17, 1995. (Dkt. Entry # 73.) Preferred filed a Reply Brief in support of its request for reconsideration and a brief in opposition to plaintiff's request for counsel fees on February 3, 1995. (Dkt. Entry # 78.) This matter is ripe for disposition.

II. DISCUSSION

A. Preferred's Motion for Reconsideration

1. Preferred's "Notice" Arguments[4]

For purposes applicable to the instant issues, WARN requires that sixty-days prior to termination of employment attributable to a "plant closing" or "mass layoff," a covered employer must serve written notice "to each affected employee." 29 U.S.C. § 2102(a)(1). The regulations promulgated by the Department of Labor concerning such notice, in pertinent part, provide:

> (d) Notice to each affected employee . . . is to be written in language understandable to the employees and is to contain:
>
> (1) A statement as to whether the planned action is expected to be permanent or temporary and, if the entire plant is to be closed, a statement to that effect;
>
> (2) The expected date when the plant closing or mass layoff will commence and the

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[4] Preferred's arguments for reconsideration will be divided between those concerning the notice Preferred provided and Preferred's "good faith" defense. Preferred's "Notice" argument and "Good Faith" defense, however, are interrelated, as Preferred argues that the two letters either provided adequate notice to the employees or tended to demonstrate Preferred's good faith. In addition, Preferred cites *Oil, Chemical and Atomic Workers v. American Home*, 790 F.Supp. 1441 (N.D.Ind. 1992), arguing that "notification not complying with the exact letter of the WARN Act [may be] deemed a good faith compliance with the provisions of the WARN Act so as to render it actual notice." (Dkt. Entry # 72 at 2.)

> expected date when the individual employee will be separated;
>
> (3) An indication whether or not bumping rights exist;
>
> (4) The name and telephone number of a company official to contact for further information. [20 C.F.R. § 639.7 (d) (1994).]

Preferred argues that the June 26 letter and the July 10 letter provided "sufficient notice to the employees so as to enable them to know that their jobs were no longer available." Preferred also argues that (a) it provided notice to Plaintiffs as soon as it learned that Culi would be taking over the operations at its Moosic plant; (b) the June and July letters conform to the "spirit" of WARN's requirements; and (c) Preferred gave "actual notice of the Culi sub-contracting and their change of employment." Preferred concludes:

> "If Plaintiffs' damage claim is sustained, the employees will be given damages for a period in which they would not have worked any way. This is clearly not the intent of the WARN Act and constitutes a bonanza to the employees." (Dkt. Entry # 78 at 4.)

In *United Steelworkers v. North Star Steel Co.*, 5 F.3d 39 (3rd Cir. 1993), *cert. denied*, 114 S.Ct. 1060 (1994), the court ruled that an employer who violated WARN was required to pay damages for each calendar day within the violation period and not merely for days within the violation period that would have been the employee's regular work day. This logic directly refutes Preferred's argument that WARN did not intend to provide "damages for a

period in which [the affected employees] would not have worked any way."

In *Washington v. Aircap Industries, Inc.*, 860 F.Supp. 307, 317 (D. S.C. 1994), the court rejected a similar attempt to avoid liability by timing a plant closing with a seasonal lay off explaining that WARN " does not contain a separate section or exemption for 'seasonal' employees." Simply stated, WARN liability may not be circumvented by converting a "seasonal" layoff into a permanent job loss through a "plant closing" or "mass layoff" occurring during the seasonal layoff. As recognized in *Carpenters District Council v. Dillard Dept. Stores*, 790 F.Supp. 663, 674 (E.D. La. 1992), *aff'd in part and rev'd in part*, 15 F.3d 1275 (5th Cir. 1994), *cert. denied*, 63 U.S.L.W. 3562 (1995), WARN provides that employees affected by a "plant closing" or "mass layoff" are guaranteed "60 days of pay for the transition period *whether or not* the business remained open for that period of time." (Emphasis added.) Giving notice of a "plant closing" or "mass layoff" to laid off employees does not provide the requisite compensated "period of time, free from unusual economic concern, to adjust to the prospective loss of employment." *Id.*

In this case, the class members' expectation of returning to employment with Preferred was destroyed on June 26, 1992, when Preferred informed them that Preferred was closing its operation. It is at this point in time, when a temporary lay off then became permanent, that a WARN violation accrued. *See Auto Mechanics Local 701 v. Santa Fe Terminal Service*, 830 F.Supp. 432, 434 (N.D. Ill. 1993). WARN anticipates that employees will receive

"their salaries, or the equivalent thereof, contemporaneously with the 60 day notification period." *Carpenters District Council*, 790 F.Supp. at 663. Preferred's June 26 and July 10, 1992 letters are not consistent with this policy.[5] Accordingly, the class members are entitled to 60 days wages commencing June 26, 1992.[6]

2. Preferred's "Good Faith" Defense

An employer who has violated WARN may appeal to the court's discretion to mitigate liability. As expressed in 29 U.S.C. 2104(a)(4):

> If an employer which has violated this chapter proves to the satisfaction of the court that the act or omission that violated this chapter was in good faith and that the employer had reasonable grounds for believing that the act or omission was not a violation of this chapter the court may, *in its discretion*, reduce the amount of the liability or penalty provided for in this section 29 U.S.C. § 2104(a)(4) [emphasis added].

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[5] Preferred does not contend that its plant closing was due to unforeseen business circumstances.

[6] This conclusion is buttressed by the fact that liability may only be reduced by wages paid by the employer for the period of the violation, 29 U.S.C. § 2104(a)(2)(A), thus indicating that liability may not be avoided or mitigated on the theory that affected employees would not have been employed during the period of violation. *Cf.*, H.R.Rep. No. 576, 100th Cong., 2nd Session at 1053 (1988), *reprinted in* 1988 U.S.C.C.A.N. 2078, 2086 (wages from another employer and unemployment compensation may not be used to mitigate WARN liability).

This "good faith" provision thus imposes two requirements of proof upon the employer: 1) that the act or omission occurred in good faith; and 2) that the employer had reasonable grounds for believing that the act or omission was not a violation of WARN. *See Washington v. Aircap Industries, Inc.*, 860 F.Supp. 307, 315 (D. S.C. 1994). "Good faith requires an honest intent to ascertain the requirements of the statute and to act accordingly." *Id.*, at 315-16 (citations omitted). The "good faith" defense, however, should be narrowly construed. *See Olsen v. Lake Country, Inc.*, 955 F.2d 203, 206 (4th Cir. 1991) ("exemptions from remedial statutes are to be construed narrowly").

As noted above, Preferred did not raise the "good faith" defense prior to its motion for reconsideration. Preferred now argues that the Court should exercise the discretion allowed in 29 U.S.C. § 2104(a)(4). In reasoning that its conduct demonstrated good faith, Preferred argues that the June 26 letter constituted notice to the employees "as soon as Defendants knew that" it would be terminating their employment and that the July 10 letter "clarified" the June 26 letter "as soon as the Employer realized that the notice it had given to the employees may have been misleading." Preferred also notes that it "first laid off [the] employees as part of its usual, seasonal lay-off" and that the employees "hired by Culi continued their work in substantially the same manner and substantially the same conditions as they had done before." In support of its appeal to this court's discretion, Preferred cites *Oil, Chemical and Atomic Workers v. American Home*, 790 F.Supp. 1441 (N.D.Ind. 1992), arguing that "notification not complying with the

exact letter of the WARN Act [may be] deemed a good faith compliance with the provisions of the WARN Act so as to render it actual notice."

In *Oil, Chemical,* the plaintiff union and defendant employer negotiated in February of 1990 over "the rights and responsibilities of the parties in the event of a plant closing." 790 F.Supp. at 1444. Eight months later, in October of 1990, the employer announced that it would close its "plant sometime between late 1990 and late 1991." *Id.* On November 1, 1990, the employer issued a letter to the union's vice president, indicating that the plant phase-out would begin in early 1991 and would be completed in late 1991. Between November, 1990, and May, 1991, the employer permanently laid-off more than 130 employees without affording them sixty days notice. The employer recalled some of those employees in February and March, 1991. *Id.* at 1444-45.

Although the November 1st letter included " 'a current list of employees by classification and a tentative schedule showing the number of employees by job groupings to be terminated during each of the four calendar quarters in 1991," and advised that the terminations would be subject to bumping rights, as required by the WARN regulations, the employer's letter did not fully comply with the applicable regulations. Accordingly, the *Oil, Chemical* court found that it was insufficient notice to satisfy the employer's WARN obligation. *Id.* The court also found, however, that the employer acted in "good faith," as provided by 29 U.S.C. § 2104(a)(4). The court based its "good faith" finding on, *inter alia,* the following factors: (a) the union knew in February of 1990 of the possibility that the plant would close; (b) the employer

verbally announced the closing in October of 1990; (c) the closing of the plant was indeed announced a year in advance; and (d) "[w]orkers laid off too soon were rehired to avoid violation of the Act." *Id.*, at 1452.

It is significant that virtually none of the factors in favor of "good faith" found in *Oil, Chemical* were exhibited by Preferred. Preferred undertook no negotiations or discussions with the Plaintiffs in the months prior to terminating them which would have indicated that their jobs were in danger. Preferred did not give a verbal notice at any point prior to the letters which informed them that they would be separated from their employment with Preferred. In addition, although Preferred rehired 15 of the 84 terminated employees, Preferred has not established that it did so in order to avoid violating WARN.

The *Oil, Chemical* court cited a case where, like the *Oil, Chemical* court's holding, the employer was found to have acted in "good faith" – *United Automobile Aerospace & Agricultural Implement Workers of America, Local 1077 v. Shadyside Stamping Corp.*, 947 F.2d 946, 1991 WL 230841 (6th Cir. 1991) (unpublished disposition). In *Shadyside*, the employer learned in the summer of 1988 that it would be losing significant business from one of its principal customers and promptly notified the union local president in writing that it would have to lay "off in excess of 50 employees after February 1, 1989 or sooner." The employer delivered a second letter to the union local president on January 4, 1989, which stated:

> This letter is just a reminder to advise you that we are still contemplating a layoff after February 1, 1989. . . . We will be trying to replace

> the [lost] work, but we do not have work to replace all of it at this time.

Neither letter contained specific dates or employee names with regard to the pending layoffs, as the regulations required. The employer laid off forty-six employees during February.

After learning that it would be losing significant business from another of its principal customers, on March 15, 1989, the employer again wrote the local union president, informing him that more layoffs would occur around April 3, 1989. Again, the letter did not contain specific dates or employee names with regard to the pending layoffs. On April 3, 1989, the employer laid off sixty-six employees.

The district court assumed, without deciding, that the employer's notices failed to comply with WARN. The district court, however, exercised the discretion afforded under section 2104(a)(4) and held that the employer was shielded from liability because it acted in good faith. In sustaining this exercise of discretion, the Sixth Circuit explained:

> We agree that Shadyside acted in good faith. Shadyside notified its employees of the layoffs more than four months in advance. This notice informed the employees that layoffs would continue through April 30, 1989. Moreover, Shadyside provided a reminder notice in January 1989. The day after it was withdrawn, Shadyside gave the Union notice of the cancellation of the [second customer] purchase order and the layoffs it would cause. Although the various notices provided by Shadyside may not have complied

> with the requirements set forth in the regulations, 29 C.F.R. § 639.7, they did include much of the required information. During the period in question, Shadyside's circumstances were rapidly evolving. It was facing unforeseen developments, such as the cancellation of the [second customer's] purchase order, and attempting to replace work it had recently lost. In this situation, the lack of scientific precision in the layoff notices does not vitiate good faith.[7]

Again, it is significant that virtually none of the factors in favor of "good faith" found in *Shadyside* were exhibited by Preferred. Unlike the employer in *Shadyside*. Preferred did not give four months advance notice or a reminder notice prior to the terminations as the *Shadyside* employer had. Preferred's notice contained virtually none of the required information – unlike the Shadyside employer's attempt. Moreover, Preferred's circumstances were not evolving at the time of the termination. Rather, Preferred caused Plaintiffs' terminations by voluntarily contracting with another entity to take over its operations.

In short, Preferred has not shown that it acted in good faith and that it had reasonable grounds at the time of the termination to believe that the terminations did not

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[7] The *Shadyside* decision has been referred to as illustrating "the proper application of the 'good-faith' defense where an employer substantially complied with the Act but committed certain technical violations." *Washington v. Aircap Industries*, 860 F.Supp. at 317. It cannot be said that Preferred substantially complied with WARN, committing only technical violations.

violate WARN. Indeed, Preferred has presented no evidence tending to show that it even considered the applicability of WARN prior to terminating Plaintiffs. Preferred proffers no evidence – such as internal memoranda discussing the applicability of WARN or records of discussions with counsel – that it believed at the time it delivered the June and July letters that it was complying with WARN or that WARN was inapplicable. The two letters certainly do not indicate that they were prepared as an attempt to satisfy WARN, or that it was believed that Preferred need not satisfy WARN.

With regard to whether Preferred acted in good faith, Preferred argues that it believed that its "joint employer" status did not trigger WARN's provisions. Yet, as just noted, Preferred proffers absolutely no evidence to show that it even knew that WARN existed prior to Plaintiffs' filing the instant lawsuit. Preferred also argues that the Plaintiffs were originally laid off as part of its usual, seasonal lay-off, but this fact would not change whether a WARN violation occurred and does not demonstrate a subjective mindset on the part of Preferred to act in accordance with WARN. Preferred's argument that as soon as it knew that it would be subcontracting the work to Culi it provided the June 26 letter does not demonstrate good faith when nothing exists in the record demonstrating that Preferred could not have arranged its affairs with Culi to provide sixty-days notice to the Plaintiffs. Finally, it would be absurd to find good faith in Preferred's argument that it clarified the misleading implication of the June 26 letter as soon as it realized the

the first letter was misleading argues against good faith.[8] The circumstances of this case clearly do not warrant the exercise of discretion to reduce liability. Indeed, Preferred's first unsuccessful argument – that it did not have to comply with WARN because it felt that the existence of a so-called "joint employer" relationship with Culi precluded application of WARN – flies in the face of its current position that it acted in qood faith to comply with WARN. Preferred's current argument, if it is consistent with its prior position, effectively is not that it acted in good faith to comply with WARN but that it acted in good faith to unknowingly provide some of the particulars required by WARN. Accordingly, Preferred's motion for reconsideration will be denied.[9]

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[8] As explained in *Jones v. Kayser-Roth Hosiery, Inc.*, 748 F.Supp. 1276 (E.D. Tenn. 1990):

> [T]he defendant's conduct *after* the violation is not relevant to the determination of good faith contemplated by the statute. The pertinent inquiry in deciding whether to exercise the court's discretion in favor of reducing the defendant's liability is the defendant's conduct *prior* to the notice; *i.e.*, whether the act or omission which violated this chapter was in good faith and whether the employer reasonably believed that the act or omission was not a violation of this Act, 29 U.S.C. § 2104(a)(4). *Id.* at 1291 [emphasis in original].

[9] Preferred also argued that the damage award should reflect Plaintiffs' actual interim earnings, citing the split between the Fifth Circuit, *Carpenters District Council of New Orleans v. Dillard*, 15 F.3d 1275 (5th Cir. 1994), *cert. denied*, 63 U.S.L.W. 3562 (U.S. 1995), and our court of appeals, *United Steelworkers v. North Star Steel Co.*, 5 F.3d 39 (3rd Cir.), *cert. denied*, 114 S.Ct. 1060 (1993). Seeming to misunderstand that the district court is bound by the holdings of its circuit court,

B. Prejudgment Interest

As noted above, this Court's December 9, 1994 Memorandum and Order left open the issue of the amount of pre-judgment interest to which Plaintiffs were entitled. Because prejudgment interest is not foreclosed by WARN and furthers the policies underlying this remedial legislation, an award of prejudgment interest is appropriate in this case. *See Carpenters District Council v. Dillard Dept. Stores,* 15 F.3d 1275 (5th Cir. 1994).

It is within the district court's discretion to set the rate of interest. *See Carpenters Dist. Council v. Dillard Dept. Stores,* 15 F.3d 1275, 1288 (5th Cir. 1994), *cert. denied,* 63 U.S.L.W. 3562 (1995); *Sun Ship, Inc. v. Matson Navigation Co.,* 785 F.2d 59, 63 (3rd Cir. 1986); *United States v. Central Gulf Lines Inc.,* 747 F.2d 315, 320 (5th Cir. 1984). Courts have set the rate of interest in WARN cases at the prevailing market rate, the "52-Week T-Bill Rate," and the rate used in backpay awards under the National Labor Relations Act ("NLRA"). *Washington v. Aircap Industries, Inc.,* 860 F.Supp. 307, 315 (D. S.C. 1994) (prevailing market rate); *Carpenters Dist. Council v. Dillard Dept. Stores,* 790 F.Supp. 663, 675 n. 46 (E.D. La. 1992) ("T-Bill" rate), *aff'd in part and rev'd in part,* 15 F.3d 1275 (5th Cir. 1994), *cert. denied,* 63 U.S.L.W. 3562 (1995); *United Steelworkers v. North Star Steel Co.,* 809 F.Supp. 5, 9 (M.D. Pa. 1992)

Preferred urges "that the issue be revisited" given "this difference between the Circuits." (Dkt. Entry # 72 at 2.) Because *Norstar* forecloses Preferred's request, it is denied.

(NLRA rate), *aff'd in part and vacated in part*, 5 F.3d 39 (3rd Cir. 1993), *cert. denied*, 114 S.Ct. 1060 (1994).

It has also been recognized that " 'state law is an appropriate source of guidance' " to determine the appropriate prejudgment interest rate in cases arising under federal law. *Hansen v. Continental Insurance Co.*, 940 F.2d 971, 984 (5th Cir. 1991). For example, Pennsylvania's prejudgment interest rate has been used in connection with a back pay award under the Fair Labor Standards Act. *See Hodgson v. Wheaton Glass Co.*, 446 F.2d 527, 529 (3rd Cir. 1971).

Last year's decision by our Court of Appeals in *United Steelworkers of America, AFL-CIO-CLC v. Crown Cork & Seal Co.*, 32 F.3d 53, 59 (3rd Cir. 1994), provides rationale for using Pennsylvania's legal rate of interest in this case. *Crown Cork* addressed whether WARN actions should be governed by NLRA's six-month statue of limitations for filing an unfair labor practice claim or the Pennsylvania statute of limitations for a state law cause of action most analogous to a WARN claim. The court acknowledged that a "superficial resemblance between the NLRA and WARN" exists in some circumstances, which is noteworthy given the fact that some courts borrow the NLRA interest rate for WARN actions. *E.g.*, *North Star Steel, supra*, 809 F.Supp. at 9. Our Court of Appeals, however, declined to follow the NLRA statute of limitations, explaining that a "fundamental distinction

[existed] between the two statutes."[10] Because of this fundamental distinction, and because the court adhered to the general assumption that when a federal statute is silent about the limitations period the court should apply the most closely analogous statute of limitations under state law, *Crown Cork* held that the most closely analogous state statute of limitations applied to WARN actions.

The Third Circuit's conclusion that WARN and the NLRA cannot be read in *pari materia* argues against applying the interest rate used in backpay awards in NLRA suits. Drawing upon Pennsylvania's legal rate of interest is at least consonant with *Crown Cork's* application of the state statute of limitations. The state rate of 6% is more than the applicable prevailing market rate and less than the NLRA rate for this matter. It is also the rate that appears to be applicable to claims under Pennsylvania's Wage Payment and Collection Law, 43 Pa.Stat.Ann. §§ 260.1, *et seq.*, and for breach of contract, the most

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[10] As the court explained:

> The rights bestowed by the NLRA focus solely on the need for a meaningful collective bargaining process; WARN provides an across-the-board substantive right. The implementing regulations of the statute highlight this crucial distinction by providing that '[c]ollective bargaining agreements may be used to clarify or [to] amplify the terms and conditions of WARN, but *may not reduce WARN rights.*' 20 C.F.R. § 639.1(g)(emphasis added). In other words, the NLRA requires notice to protect the meaningfulness of the collective bargaining process; WARN's purpose is to substantively protect employees and their communities. [*Id.* at 58-59.]

analogous state law causes of action. It is thus appropriate to apply that rate to WARN claims of persons working in Pennsylvania. Accordingly, discretion will be exercised to set the rate of prejudgment interest at Pennsylvania's legal rate, which is 6%. *See* 42 Pa.Stat.Ann. § 8101. Interest will be calculated from August 25, 1992 (60 days after the WARN claims accrued) to December 9, 1994.[11]

C. Attorney's Fees

Finally, Plaintiffs seek the award of attorneys' fees and costs pursuant to 29 U.S.C. § 2104(a)(6), which provides that "the court, in its discretion, may allow the prevailing party a reasonable attorney's fee as part of the costs." Plaintiffs seek $40,286.25 in attorneys' fees and $1,122.01 in costs, totalling $41,408.26. (Dkt. Entry # 68 at 1.)

Preferred "does not contest Plaintiff's counsel's hourly rate or its submission of hours in support of its motion for counsel fees." (Dkt. Entry # 78 at 8.) Preferred instead asks the Court to employ its discretion to "decline to award any counsel fees." (*Id.*) Preferred's request is based upon its alleged "good faith" efforts to comply with WARN and the argument that, "[s]ince the Plaintiffs will in effect be receiving double payments, that is WARN Act damages plus interim earnings, it is Plaintiffs who should bear the cost of their own counsel fees." (*Id.* at 8-9.)

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[11] The class members will be entitled to post-judgment interest under 28 U.S.C. § 1961 from December 9, 1994 to satisfaction of judgment.

In *United Steelworkers of America v. North Star Steel Co.*, 5 F.3d 39, 44 (3rd Cir. 1993), *cert. denied*, 114 S.Ct. 1060 (1994), the court held that under 29 U.S.C. § 2104(a)(6) a prevailing plaintiff should be awarded fees " 'unless special circumstances would render such an award unjust.' " Preferred's "good faith" argument was addressed earlier in this Memorandum and rejected. It does not serve as an appropriate rationale for denying attorneys' fees and costs. Consequently, Plaintiffs will be awarded $41,408.26 in attorneys' fees and costs.

D. Damages Calculation

The December 9, 1994 Memorandum noted that Plaintiffs' statement of uncontested facts, which they attached to their motion for summary judgment (Dkt. Entry # 40), was deemed admitted. The statement listed the final hourly pay rate and termination date for each Plaintiff. The statement also calculated the total pay each Plaintiff would receive over a sixty-day period.[12] Each Plaintiff is awarded the damage total calculated in the statement. In addition, each Plaintiff is awarded prejudgment interest at the rate of 6% from August 25, 1992, to December 9, 1994.[13]

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[12] Preferred has not disputed the calculation of WARN damages for each Plaintiff.

[13] The following calculation arrived at the interest award for each Plaintiff: (.06 x [employee's wages over 60 days])(2 + 107/365). One hundred and seven days passed between August 25 and December 9. All calculations are rounded off to the hundredth decimal.

The principal damage award and total damage award for each class member is as follows:

Class Member	Principal Award	Total (with prejudgment interest)
Michele Ash	$2,280.00	$2,593.27
Frances B. Benjamin	3,936.00	4,476.81
Sally A. Bentler	4,358.40	4,957.24
Daniel E. Besecker	2,280.00	2,593.27
Arthur G. Blasko	2,280.00	2,593.27
Mellody A. Bloom	2,280.00	2,593.27
John R. Brennan	4,536.00	5,159.25
Joseph Bruneshefski	4,320.00[14]	4,778.57
Debra M. Bryk	3,633.60	4,132.87
Florence Bryk	3,897.60	4,433.14
Romilda R. Bussacco	3,936.00	4,476.81
Florence Ceccarelli	3,633.60	4,132.87
Hugh Coolbaugh	2,280.00	2,593.27
Dian Crowningshield	2,280.00	2,593.27
Theresa Davin	3,777.60	4,296.65
Dorothy Davis	3,854.40	4,383.99
Rosemary Deangelo	3,936.00	4,476.81
Louise Denniston	2,280.00	2,593.27
Joseph Distasi	4,056.00	4,613.29
Christine Dommes	2,280.00	2,593.27
William Doran	2,520.00	2,866.25
John Ferack	4,776.00	5,432.22
Joan Geklinsky	3,936.00	4,476.81
Thomas Grobosky	3,633.60	4,132.87
Carol Hall	3,936.00	4,476.81
Elizabeth Harris	2,280.00	2,593.27

---

[14] Bruneshefski worked 15 hours subsequent to his termination, and his award is offset by those earnings, or $135.00.

James Henningan	2,280.00	2,593.27
Lydia Hreben	3,897.60	4,433.14
Lisa Ihnat	2,664.00	3,030.03
Stephen Jacek	4,536.00	5,159.25
Donald Jackson	4,536.00	5,159.25
Peggy Jackson	3,936.00	4,476.81
Mollie Jensen	3,633.60	4,132.87
Marie Kalwaytis	3,936.00	4,476.81
Denise Kochis	2,280.00	2,593.27
Doris Kremitske	2,664.00	3,030.03
Bruce Kumor	2,280.00	2,593.27
Maryann Lippiet	2,280.00	2,593.27
Salvatore Mantione	3,700.80	4,209.29
Harry Miller	2,280.00	2,593.27
George Moser	2,280.00	2,593.27
Shirley Mustich	3,936.00	4,476.81
Karen Nagle	2,280.00	2,593.27
Lenore Navoczynski	3,700.80	4,209.29
Madhu Patel	2,280.00	2,593.27
Sitaben Patel	2,280.00	2,593.27
Cynthia Plisko	3,633.60	4,132.87
Kenneth Radford	2,280.00	2,593.27
Kathleen Reap	2,664.00	3,030.03
Christine Rodgers	3,633.60	4,132.87
Rose Ramanowsky	3,936.00	4,476.81
Nicholas Rosselli	4,536.00	5,159.25
Elias Ruschak	3,936.00	4,476.81
Patricia Sanchuk	4,752.00	5,404.92
Frances Scaramastro	3,633.60	4,132.87
Michael Schofield	2,280.00	2,593.27
Dorothy Slusher	2,664.00	3,030.03
Rose Stancheski	2,280.00	2,593.27
Martha Swanek	3,936.00	4,476.81
Sally Tansits	3,936.00	4,476.81
Michael Thomas	2,280.00	2,593.27
Janet Tibbs	2,280.00	2,593.27
Lois Tilberry	2,520.00	2,866.25

Carl Turner	3,360.00	3,821.67
Olga Vanluvender	3,936.00	4,476.81
Maryanne Walker	2,280.00	2,593.27
Joseph Wegleski	4,536.00	5,159.25
Margurite J. Wesley	2,422.00	2,754.78
Daniel Williams	2,220.00	2.593.27
Total Damage Award		$253,337.43

An appropriate Order is attached. The Clerk of Court will be directed to enter judgment in favor of Plaintiffs and against Defendant in accordance with the form of judgment also attached hereto.

/s/ Thomas I. Vanaskie
Thomas I. Vanaskie
United States District Judge

DATED: March 1, 1995

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

MARIE A. KALWAYTIS; PEGGY JACKSON; LYDIA T. HREBEN; and SHIRLEY MUSTICH,	:	**NO. 3:CV-93-371**
	:	**JUDGE VANASKIE**
Plaintiffs	:	**(Filed Mar. 1, 1995)**
vs.	:	
PREFERRED MEAL SYSTEMS, INC., a Delaware Corporation,	:	
Defendant	:	

ORDER

NOW, THIS 1ST DAY OF MARCH, 1995, for the reasons set forth in the accompanying Memorandum, **IT IS HEREBY ORDERED THAT:**

1. Defendant's motion for reconsideration (Dkt. Entry # 72) is **DENIED.**

2. Plaintiffs' motion for attorneys' fees and costs (Dkt. Entry # 68) is **GRANTED.**

3. The Clerk of Court is directed to enter judgment in accordance with the form of judgment attached hereto.

6. The Clerk of Court is directed to close this case file.

/s/ Thomas I. Vanaskie
Thomas I. Vanaskie
United States District Judge

APPENDIX E

IN THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

MARIE A. KALWAYTIS; PEGGY JACKSON; LYDIA T. HREBEN; and SHIRLEY MUSTICH, Plaintiffs	:	NO. 3:CV-93-371
vs.	:	JUDGE VANASKIE
PREFERRED MEAL SYSTEMS, INC., a Delaware Corporation, Defendant	:	(Filed Mar. 1, 1995)

FINAL JUDGMENT

NOW, THIS 1ST DAY OF MARCH, 1995, for the reasons set forth in this Court's Memorandum and Order dated December 9, 1994 granting Plaintiffs' Motion for Summary Judgment and denying Defendant's Cross-Motion for Summary Judgment, as supplemented by this Court's Memorandum dated March 1, 1995, rejecting Defendant's Request for Reconsideration, liquidating pre-judgment interest, and awarding attorneys' fees and expenses against Defendant pursuant to the Worker Adjustment and Retraining Notification Act of 1988 ("WARN"), 29 U.S.C. § 2101, *et seq.*, **IT IS HEREBY ORDERED AND ADJUDGED:**

1. That, pursuant to Rule 23 of the Federal Rules of Civil Procedure, this Court, on the basis of the undisputed evidence of record, hereby determines that the ultimate definition of the class shall include: "All individuals who were non-part-time employees of Defendant at

its Moosic, Pennsylvania plant who involuntarily ceased active employment with Defendant during any 30-day period between May 15 and June 19, 1992, during which period at least 50 non-part-time employees and at least 33% of all non-part-time employees of Defendant at the Moosic plant ceased employment; and

2. That, pursuant to Rule 23(c) of the Federal Rules of Civil Procedure, the 69 individuals listed in Paragraph 3 of this Order and Judgment are hereby determined to be the identified individuals to whom notice was provided pursuant to Rule 23 and whom the Court finds to be appropriate members of the class entitled to relief under WARN; and

3. That judgment shall be, and hereby is, entered against Defendant and in favor of each of the following 69 class members for the amounts listed next to their names for WARN back pay and pre-judgment interest from August 25, 1992 to December 9, 1994, the date of this Court's Order granting summary judgment:

Class Member	Principal Award	Total (with prejudgment interest)
Michele Ash	$2,280.00	$2,593.27
Frances B. Benjamin	3,936.00	4,476.81
Sally A. Bentler	4,358.40	4,957.24
Daniel E. Besecker	2,280.00	2,593.27
Arthur G. Blasko	2,280.00	2,593.27
Mellody A. Bloom	2,280.00	2,593.27
John R. Brennan	4,536.00	5,159.25
Joseph Bruneshefski	4,320.00	4,778.57
Debra M. Bryk	3,633.60	4,132.87
Florence Bryk	3,897.60	4,433.14

Romilda R. Bussacco	3,936.00	4,476.81
Florence Ceccarelli	3,633.60	4,132.87
Hugh Coolbaugh	2,280.00	2,593.27
Dian Crowningshield	2,280.00	2,593.27
Theresa Davin	3,777.60	4,296.65
Dorothy Davis	3,854.40	4,383.99
Rosemary Deangelo	3,936.00	4,476.81
Louise Denniston	2,280.00	2,593.27
Joseph Distasi	4,056.00	4,613.29
Christine Dommes	2,280.00	2,593.27
William Doran	2,520.00	2,866.25
John Ferack	4,776.00	5,432.22
Joan Geklinsky	3,936.00	4,476.81
Thomas Grobosky	3,633.60	4,132.87
Carol Hall	3,936.00	4,476.81
Elizabeth Harris	2,280.00	2,593.27
James Henningan	2,280.00	2,593.27
Lydia Hreben	3,897.60	4,433.14
Lisa Ihnat	2,664.00	3,030.03
Stephen Jacek	4,536.00	5,159.25
Donald Jackson	4,536.00	5,159.25
Peggy Jackson	3,936.00	4,476.81
Mollie Jensen	3,633.60	4,132.87
Marie Kalwaytis	3,936.00	4,476.81
Denise Kochis	2,280.00	2,593.27
Doris Kremitske	2,664.00	3,030.03
Bruce Kumor	2,280.00	2,593.27
Maryann Lippiet	2,280.00	2,593.27
Salvatore Mantione	3,700.80	4,209.29
Harry Miller	2,280.00	2,593.27
George Moser	2,280.00	2,593.27
Shirley Mustich	3,936.00	4,476.81
Karen Nagle	2,280.00	2,593.27
Lenore Novczynski	3,700.80	4,209.29
Madhu Patel	2,280.00	2,593.27
Sitaben Patel	2,280.00	2,593.27
Cynthia Plisko	3,633.60	4,132.87

Kenneth Radford	2,280.00	2,593.27
Kathleen Reap	2,664.00	3,030.03
Christine Rodgers	3,633.60	4,132.87
Rose Ramanowsky	3,936.00	4,476.81
Nicholas Rosselli	4,536.00	5,159.25
Elias Ruschak	3,936.00	4,476.81
Patricia Sanchuk	4,752.00	5,404.92
Frances Scaramastro	3,633.60	4,132.87
Michael Schofield	2,280.00	2,593.27
Dorothy Slusher	2,664.00	3,030.03
Rose Stancheski	2,280.00	2,593.27
Martha Swanek	3,936.00	4,476.81
Sally Tansits	3,936.00	4,476.81
Michael Thomas	2,280.00	2,593.27
Janet Tibbs	2,280.00	2,593.27
Lois Tilberry	2,520.00	2,866.25
Carl Turner	3,360.00	3,821.67
Olga Vanluvender	3,936.00	4,476.81
Maryanne Walker	2,280.00	2,593.27
Joseph Wegleski	4,536.00	5,159.25
Margurite J. Wesley	2,422.00	2,754.78
Daniel Williams	2,280.00	2,593.27
Total Damage Award		$253,337.43

4. That the said members of the class shall be entitled to interest on all amounts listed next to their names in Paragraph 3, above, calculated in the manner set forth in 28 U.S.C. § 1961 for calculating post-judgment interest, beginning on December 9, 1994, the date of this Court's Order granting summary judgment in favor of the class;

5. That judgment shall be, and hereby is, entered against Defendant requiring it to pay attorneys' fees in the amount of $40,286.25 and to reimburse costs and expenses of $1,122.01, pursuant to WARN, § 2104(a)(6), to

the law firm of Handler, Gerber, Johnston & Aronson, P.C., as counsel to Plaintiffs and the class.

/s/ Thomas I. Vanaskie
Thomas I. Vanaskie
United States
District Judge

(2)

Supreme Court, U.S.
FILED
AUG 15 1996
CLERK

No. 95-1984

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1995

PREFERRED MEAL SYSTEMS, INC.,
Petitioner,

v.

MARIE A. KALWAYTIS; PEGGY JACKSON;
LYDIA T. HREBEN; SHIRLEY MUSTICH,
Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

James A. Diamond, Esquire
Counsel of Record

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Attorneys for Respondents

PACKARD PRESS® / APPELLATE DIVISION, 1617 JFK BOULEVARD, PHILA., PA. 19103 (215) 563-9000

18 pp

QUESTION PRESENTED

Where an employer violates the employee notification requirements of the Worker Adjustment and Retraining Notification Act (the "WARN Act"), 29 U.S.C. § §2101, *et seq.*, is the employer subject to liability under 29 U.S.C. §2104(a)(1)(A) for a component of damages equal to the applicable daily rate of compensation for each day of the violation period, or only for work days within the violation period?

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STATUTES

Worker Adjustment and Retraining Notification Act, 29 U.S.C. §§2101, *et seq*. ..... *passim*

STATEMENT OF THE CASE

In addition to the factual background on the merits set forth in the Statement of the Case by Preferred Meal Systems, Inc. ("Petitioner" or "Preferred") in its Petition for Certiorari, the following procedural facts are pertinent to the issue of whether this Court should grant certiorari.

The Respondents, who are former employees of Preferred, commenced this action by filing a Complaint in the United States District Court for the Middle District of Pennsylvania alleging that Preferred violated the employee notification requirements of the Worker Adjustment and Retraining Notification Act (the "WARN Act"), 29 U.S.C. §§2101, *et seq.*, in connection with a mass layoff at Preferred's Moosic, Pennsylvania plant in 1992. The case was thereafter certified as a class action.

On the basis of reciprocal motions for summary judgment, the District Court ultimately entered a Final Judgment in favor of Respondents which included, among other relief, back pay damages calculated at sixty times each individual employee's daily rate of compensation. *See* March 1, 1995 Memorandum, Order and Final Judgment of the District Court (reprinted as Appendices C, D and E to Petition for Certiorari). These calculations had been proposed by Respondents as part of their Statement of Uncontested Facts in connection with the summary judgment motions, had been uncontested by Petitioner in the proceeding, and had been deemed as admitted pursuant to the District Court's applicable local rules. *See, e.g.*, December 9, 1994 Memorandum of the District Court, Appendix B to Petition for Certiorari, p. 30a, n. 14. No detailed facts concerning which days in the applicable period would have been non-work days for given employees were ever developed in the proceedings before the District Court.

Following the entry of the March 1, 1995 Final Judgment of the District Court which included the back pay computed on a calendar day basis, Petitioner filed a timely Notice of Appeal precisely framing the issues it was presenting for appeal to the United States Court of Appeals for the Third

Circuit. *See* Notice of Appeal (reprinted as Appendix A to this Brief, pp. 1a-2a). The listed issues did not include the issue whether back pay under 29 U.S.C. §2104(a)(1)(A) is calculated only with reference to work days. *See id.*

Petitioner's primary Brief to the Third Circuit, in its Statement of Issues, essentially repeated the limited issues Petitioner had preserved in its Notice of Appeal. *See* Statement of Issues excerpted from Petitioner's Brief for Appellant filed with the Third Circuit (reprinted as Appendix B to this Brief, p. 3a). The "work day" versus "calendar day" issue was again absent from the Statement of Issues. *See id.*

The Decision of the Third Circuit in the instant case did not directly reconsider the actual "calendar days" versus "work days" issue that it had previously decided in the case of *United Steelworkers of America v. North Star Steel Company,* 5 F.3d 39 (3d Cir. 1993), *cert. denied,* ___ U.S. ___, 114 S.Ct. 1060 (1994). In distinguishing the issue upon which its decision in the instant case turned from that of *North Star Steel,* the Circuit Court stated, "Because the termination date of employment was not pertinent in North Star Steel, we did not address the point, and that case does not control the resolution of the issue here." *See* Opinion of the Third Circuit, Appendix A to Petition for Certiorari, p. 7a.

REASONS FOR DENYING THE WRIT

A. THE "CALENDAR DAY" VERSUS "WORK DAY" ISSUE OF LAW URGED FOR CERTIORARI IS NOT PRESERVED OR PRESENTED IN THE RECORD BELOW WITH SUFFICIENT CLARITY TO MAKE THIS CASE AN IDEAL VEHICLE FOR ADDRESSING THAT ISSUE.

It is true that a split of authority has begun to develop on the specific issue whether under 29 U.S.C. §2104(a)(1)(A) the back pay liability of an employer who violates the WARN Act is calculated on the basis of all calendar days or only work days within the violation period. Section 5(a)(1)(A) of the WARN Act, 29 U.S.C. §2104(a)(1)(A), which makes a violat-

ing employer liable for "back pay for each day of violation," has been interpreted by the Third Circuit in *United Steelworkers of America v. North Star Steel Co.*, 5 F.3d 39 (3d Cir. 1993), *cert. denied*, ____ U.S. ____, 114 S.Ct. 1060 (1994), to require that back pay be calculated on the basis of all calendar days in the violation period. By contrast, the Fifth Circuit in *Carpenters District Council v. Dillard Department Stores, Inc.*, 15 F.3d 1275 (5th Cir. 1994), *cert. denied*, ____ U.S. ____, 115 S.Ct. 993 (1995), took the view that back pay under that provision is calculated only with respect to work days in the violation period. The Fifth Circuit's approach was subsequently adopted by the Tenth Circuit in *Frymire v. Ampex Corp.*, 61 F.3d 757 (10th Cir. 1995).

Regardless of whether this Honorable Court would generally view the straightforward "calendar day" versus "work day" issue as one worthy of certiorari, however, that issue was *not* clearly pressed or directly passed upon in the instant case.

A review of the actual record shows that although Petitioner preserved and pressed a material issue about the interpretation of 29 U.S.C. §2104(a)(1)(A) in calculating WARN back pay damages, it was in a specific context that had a very different focus from the "work days" versus "calendar days" issue it now presents as a question for certiorari. The issue preserved and directly presented in the record centered on Petitioner's argument that the award of sixty days back pay damages should be reduced to reflect certain "interim earnings" allegedly received by some former employees. Specifically, Petitioner was arguing to the courts below that to the extent any of its former employees managed to obtain jobs with the contractor that it hired to replace the employees at the plant, earnings received by employees from that contractor should be taken into account to reduce back pay liability.

For example, following the District Court's entry of its Final Judgment and Order, which included the award of back pay damages calculated on a calendar day basis, Petitioner filed a Notice of Appeal delineating the issues it was preserving for appeal. In pertinent part, it provided:

> "The grounds upon which Defendant appeals are as follows:

District Court erred in awarding Summary Judgment to Plaintiffs in that:

1. No violations of the WARN Act occurred;

2. Fewer than the minimum number of employees lost employment;

3. Defendant and Culi Services, Inc. were joint employers; and

4. There were genuine issues of material fact which should have prevented an award of Summary Judgment.

[5.] District Court erred in not finding good faith by Defendant.

[6.] *District Court erred in not taking into account interim earnings of employees."*

Notice of Appeal, pp. 1-2, Appendix A to this Brief, pp. 1a-2a (emphasis added). Similarly, Petitioner's Statement of Issues in its primary Brief on the merits to the Third Circuit, framed the issues as follows:

"1. Whether the WARN Act is violated when an employer subcontracts work to a sub-contractor [sic] which in turn provides employment to most of the workers;

2. Whether Defendant and its sub-contractor [sic] were joint employers under the provisions of the WARN Act and; whether there are genuine issues of material fact concerning this which should have been resolved prior to the award of summary judgment;

3. Whether the court erred in not applying the "good faith" defense to Appellants; and

4. *Whether the District Court erred in not taking into account interim earnings of employees in assessing damages."*

Statement of Issues excerpted from Petitioner's Brief for Appellant filed with the Third Circuit, Appendix B to this Brief, p. 3a (emphasis added).

Conspicuously absent from the narrowly framed issues preserved in Petitioner's appeal to the Court of Appeals was the actual "calendar days" versus "work days" question upon which the Circuits have diverged. The closest issue raised by Petitioner was its issue about whether, under the unique cir-

cumstances of this case, any earnings received by class members from Petitioner's contractor should be subtracted from back pay damages.

Admittedly, Petitioner's demand for the setoff of interim earnings does very generally involve an interpretation of 29 U.S.C. §2104(a)(1)(A). In an esoteric sense, it also is incompatible with one portion of the logic used by the Third Circuit in its *North Star Steel* case. There, in reaching its conclusion on the separate "calendar days" issue, the Third Circuit, as one of its alternative grounds to its reasoning that the statute is unambiguous, noted its view that the WARN Act's back pay scheme does not envision a "lost earnings" approach. Petitioner's demand for a setoff cannot be squared with that reasoning.

Notwithstanding that Petitioner's setoff issue implicates the same statutory provision as the calendar day/work day issue and has a tangential connection with some of the general reasoning in *North Star Steel,* the interim earnings issue Petitioner raised in the courts below is very different from the actual "calendar days" versus "work days" issue.[1]

Although Petitioner tries to recast the instant case as a direct reincarnation of the Third Circuit's *North Star Steel* case, the Circuit Court's decision here is not susceptible to such characterization. In this case, the Third Circuit did, as a matter of background, note its general calendar day holding in *North Star Steel,* and the contrary decisions of the Fifth and Tenth Circuits. However, the Circuit Court in no way purported to revisit or actually pass upon the calendar day issue. Quite the opposite, the court expressly emphasized that the issue upon which its decision in the present case turned was distinguishable from the calendar day issue. The Court explained:

---

1. Aside from being inconsistent with a piece of the reasoning in *North Star Steel,* Petitioner's interim earnings position in the lower courts is without factual support in the record and is arguably incompatible with Section 5(a)(2) of the WARN Act, 29 U.S.C. §2104(a)(2), which provides the exclusive list of setoffs from WARN back pay.

> "Because the termination date of employment was not pertinent in North Star Steel, we did not address the point and that case does not control the resolution of the issue here."

Opinion of the Third Circuit, Appendix A to Petition for Certiorari, p. 7a. Indeed, the Court of Appeals not only disavowed any controlling effect of its *North Star Steel* calendar day holding on an unrelated issue being addressed in this case concerning the date of the employment loss, it even relied upon the very *Dillard* decision that created the split of authority on the distinguishable calendar day issue. *See id.*, p. 11a.

Though the issue now being urged for certiorari might have been directly pressed for appeal and squarely treated by the Third Circuit in the instant case, it was not. Since the record does not present with clarity the actual issue now brought to this Court by the Petitioner, this case is not an appropriate one to afford a proper review of that issue. *Cf., Kimbrough v. United States,* 364 U.S. 661, *reh'g. denied,* 365 U.S. 825 (1961) (holding certiorari improvidently granted where question had not been presented with sufficient clarity below).

B. THE CURRENT RECORD IN THIS CASE, WHICH IS ON REMAND TO THE DISTRICT COURT, IS BARREN OF ACTUAL FACTS PRESENTING THE ISSUE URGED FOR CERTIORARI.

Even ignoring that the issue itself was not preserved and pressed with clarity below, this case, at least in its current posture, is particularly ill-suited for resolving the existing split of authority on the "work days" versus "calendar days" issue. This is because the actual facts needed to make that issue concrete do not exist in the record.

To permit thorough consideration of the "work days" versus "calendar days" issue in other than an abstract and hypothetical manner obviously requires a developed factual matrix containing at least the details of what days during the relevant period the employees would have worked and the nuances and circumstances of such non-work days. The record as it presently sits does not contain the actual critical facts with

respect to what days the employees in question would have worked during the "violation period" (*i.e.*, the period after the employment loss date), or even during the "notice period" (*i.e.*, the period leading up to the employment loss).[2]

In its Petition for Certiorari, Preferred raises specific factual issues, for which actual evidence and findings have not been developed on the record, concerning "regular days off" and "seasonal layoff" days. *See* Petition for Certiorari, p. 11. Indeed, at this point there are not even sufficient facts to determine what the employees' respective violation periods are, since this is dependent upon facts to be developed on remand. *See* Opinion of the Third Circuit, Appendix A to Petition for Certiorari, pp. 11a-13a.

Regarding the "seasonal layoff" factual issue, the Third Circuit's Decision below credited general assertions by Petitioner that there was some sort of seasonal layoff that came into play, but the Decision, acknowledging the current lack of a complete factual record regarding the details of the claimed seasonal layoff, remanded the case to the District Court for development of those facts.[3] Obviously, facts that would be necessary to appropriately delineate and make tangible the currently-abstract seasonal layoff issue include facts about such matters as which individuals were affected, the length of the layoffs, whether the layoffs were voluntary, and whether they were predictable from year to year. At least at this juncture, this case does not offer a sufficiently ripe set of facts even as to the seasonal layoff issue to make it a viable tool for treating the issue for which certiorari has been requested.

Regarding the factual issue concerning regular days off during the applicable period for any employees not on sea-

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2. As discussed below, Preferred, in requesting certiorari, urges a work day analysis that focuses on work days in the "notice period." This is inconsistent with the analysis in the *Dillard* and *Frymire* cases, which base WARN back pay damage calculations on work days within the "violation period" following the triggering employment loss.

3. The remand regarding the seasonal layoff issue is in order to determine the employment loss dates and, hence, how much notice had been given. It was not related to a "calendar day" versus "work day" issue under 29 U.S.C. §2104(a)(1)(A). *See* Opinion of the Third Circuit, Appendix A to Petition for Certiorari, pp.11a-13a.

sonal layoff, there are no facts in the record, and that issue is not even encompassed by the pending remand.

Petitioner's request that this Court consider the "calendar days" versus "work days" issue with only hypothetical and abstract facts to draw upon is akin to a request to this Court to render an advisory opinion. Given the immature factual record in this case, this Court should deny the Petition for Certiorari. *Cf. Conway v. California Adult Authority,* 396 U.S. 107, *reh'g. denied,* 396 U.S. 1030 (1969) (dismissing Writ of Certiorari as improvidently granted where actual record facts did not support issue).

Moreover, the peculiar factual issues overlaid into this case regarding the interplay of the independent contractor and the claimed seasonal layoff issue make this case a cumbersome and overly complex one for treating the straightforward "work days" versus "calendar days" issue. Because the pertinent facts of this case are at best cloudy and incomplete, and because of the very peculiar and inordinately complex circumstances involved, this case would not be of assistance to this Court in resolving the existing split of authority.

C. TO THE EXTENT THAT THE ISSUE FRAMED BY PETITIONER FOCUSES UPON WORK DAYS DURING THE "NOTICE PERIOD" AS OPPOSED TO THE "VIOLATION PERIOD," IT IS DISTINGUISHABLE FROM THE ISSUE DIVIDING THE CIRCUITS.

Though it is somewhat ambiguous, the issue framed for your Honorable Court by Petitioner—both on its face and when assessed in view of the argument advanced by Petitioner in support of its request for certiorari—appears to be focusing on whether calendar days or work days during the *notification period* should determine WARN back pay. If Petitioner actually does intend to assert an issue focusing on the notification period, which is the period of time prior to the employment loss, as opposed to focusing on the "violation period" following the employment loss, that issue is distinguishable from the one upon which the circuits have split.

In this regard, Petitioner's statement of the "question presented" refers somewhat ambiguously to the "improper notice period" as the time frame at issue. In its argument for why certiorari should be granted, Petitioner argues, in pertinent part:

> "Specifically, the Third Circuit's opinion would require payment for days the Respondent would have been on *normal seasonal layoff,* and for *regular days off* during the *notice period."*

Petition for Certiorari, p. 11 (emphasis added to "notice period"). The notification period under the WARN Act is the sixty-day period preceding the employment loss constituting part of a plant closing or mass layoff. *See, e.g.,* 29 U.S.C. §2102(a) (requiring notice prior to plant closing or mass layoff).

The Fifth Circuit's *Dillard* decision and the Tenth Circuit's *Frymire* decision, in rejecting the Third Circuit calendar day approach, focused on work days during the "violation period" following the triggering employment losses, as opposed to during the notice period preceding the employment losses. The *Dillard* decision explained as follows:

> "As the Conference Report clearly states, the violation period is composed of those days *after* the employee has been terminated or *after* the employee's hours have been substantially reduced without adequate notice. . . . Section 2104(a)(2) allows an employer to deduct wages earned for work performed *during* the violation period."

Dillard, 15 F.3d 1275, 1284 n. 14 (5th Cir. 1994), *cert. denied,* ____ U.S. ____, 115 S.Ct. 993 (1995) (citation omitted) (emphasis in original).

Accordingly, to the extent Petitioner may be attempting to assert an issue focusing on the notice period prior to the mass layoff, any such issue would be distinguishable from the issue that has begun to divide the circuits and would not be a substantial enough issue to warrant certiorari.

CONCLUSION

For all the reasons set forth above, the Writ of Certiorari should not be granted in this case.

Respectfully submitted,

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Attorneys for Respondents

Dated: August 14, 1996

Appendix

APPENDIX A

PETITIONER'S NOTICE OF APPEAL FILED WITH THE DISTRICT COURT

IN THE UNITED STATES DISTRICT COURT
FOR THE
MIDDLE DISTRICT OF PENNSYLVANIA

MARIE A. KALWAYTIS; PEGGY JACKSON; LYDIA T. HREBEN and SHIRLEY MUSTICH, Plaintiffs	:	CASE NO. 3:CV-93-371 **NOTICE OF APPEAL**
v.	:	
PREFERRED MEAL SYSTEMS, INC., a Delaware Corporation, Defendant	:	

PREFERRED MEAL SYSTEMS, INC., Defendant, appeals to the United States Court of Appeals for the Third Circuit, from the Final Order dated March 1, 1995 by Judge Vanaskie in the United States District Court for the Middle District of Pennsylvania. The parties to the Order appealed from and the names and addresses of their respective attorneys are as follows:

James A. Diamond, Esq.
Handler, Gerber, Johnston & Aronson
P.O. Box 98
150 Corporate Center Drive, Suite 100
Camp Hill, PA 17001-0098

The grounds upon which Defendant appeals are as follows:

District Court erred in awarding Summary Judgment to Plaintiffs in that:

1. No violations of the WARN Act occurred;

2. Fewer than the minimum number of employees lost employment;

3. Defendant and Culi Services, Inc. were joint employers; and

4. There were genuine issues of material fact which should have prevented an award of Summary Judgment.

District Court erred in not finding good faith by Defendant.

District Court erred in not taking into account interim earnings of employees.

Dated: South Orange, New Jersey
March 29, 1995

/S/ Stuart Bochner

Stuart Bochner, Esq. - 6557
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APPENDIX B

STATEMENT OF ISSUES EXCERPTED FROM PAGES 1 AND 2 OF PETITIONER'S BRIEF FOR APPELLANT FILED WITH THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

STATEMENT OF ISSUES

The issues presented by this appeal pertain to the application of the WARN Act to circumstances under which an employer sub-contracts work to a sub-contractor which in turn provides employment to most of the employer's employees. Specifically, the issues raised by this appeal are as follows:

1. Whether the WARN Act is violated when an employer subcontracts work to a sub-contractor which in turn provides employment to most of the workers;

2. Whether Defendant and its sub-contractor were joint employers under the provisions of the WARN Act and; whether there are genuine issues of material fact concerning this which should have been resolved prior to the award of summary judgment;

3. Whether the court erred in not applying the "good faith" defense to Appellants; and

4. Whether the District Court erred in not taking into account interim earnings of employees in assessing damages.

Supreme Court, U.S.
FILED
SEP 5 1996
CLERK

No. 95-1984

In The

Supreme Court of the United States

October Term, 1995

PREFERRED MEAL SYSTEMS, INC.,

Petitioner,

v.

MARIE A. KALWAYTIS; PEGGY JACKSON; LYDIA T. HREBEN; SHIRLEY MUSTICH,

Respondents.

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

REPLY TO BRIEF IN OPPOSITION

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10 pp

QUESTION PRESENTED

When employees fail to receive the proper notice of plant closing under the Workers Adjustment and Retraining Notification Act ("WARN Act"), 29 U.S.C. Section 2101 *et seq.*, are they entitled to receive damages for each calendar day of the improper notice period, or only for work days within the improper notice period?

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POINT I

RESPONDENTS' REASON FOR DENYING THE WRIT ARE WITHOUT MERIT.

A. The Record Below And The Third Circuit's Opinion Clearly Preserved The "Calendar Day" Versus "Work Day" Issue.

As Respondents' Brief in Opposition concedes, "a split of authority has begun to develop on the specific issue whether under 29 U.S.C. Section 2104(a)(1)(A) the backpay liability of an employer who violates the WARN Act is calculated on the basis of all calendar days or only work days within the violation period." (Brief in Opposition p. 2).

Respondents assert, however, that the issue of "calendar day" versus "work day" was not raised in the District Court nor in the Circuit Court below and thus, should not be considered by this Court. Respondents' argument in this regard is specious and without merit.

When the District Court granted summary judgment in favor of Respondents, it relied upon, and was bound to follow as a matter of law, Third Circuit precedent as set forth in *United Steelworkers of America v. North Star Steel Co.*, 5 F.3d 39 (3d Cir. 1993), *cert. denied*, ___ U.S. ___, 114 S.Ct. 1060 (1994). (*See* Appendix B to Petition for Certiorari, p. 22a).

Further, when the District Court considered the Petitioner's Motion for Reconsideration (Appendix C to Petition for Certiorari, pp. 32a to 56a), the District Court stated, in pertinent part:

> In *United Steelworkers v. North Star Steel Co.*, 5 F.3d 39 (3rd Cir. 1993), *cert. denied*, 114 S.Ct. 1060 (1994), the court ruled that an employer who violated WARN was required to pay damages for each calendar day within the violation period and not merely for days within the violation period that would have been the employee's regular work day.

(Petition for Certiorari, Appendix C, p. 39(a)).

Moreover, the issue of "calendar day" versus "work day" was directly raised at oral argument before the Court of Appeals. The Court of Appeals, however, declined to reconsider this issue, writing instead:

> In *United Steelworkers of America v. North Star Steel*, 5 F.3d 39, 43 (3d Cir. 1993), we concluded that "WARN uses the term 'back pay' simply as a label to describe the daily rate of damages payable." Hence, that case establishes the upper limit of damages applicable here as 60 calendar days wages. *Contra Frymire v. Ampex Corp.*, 61 F.3d 757, 771-72 (10th Cir. 1995) (damages calculated on number of working days lost during the violation period); *Carpenters Dist. Council v. Dillard Dep't Stores, Inc.*, 15 F.3d 1275, 1286 (5th Cir. 1994) (same).

(Petition for Certiorari, Appendix A, p. 7a).

By so doing, the Third Circuit acknowledged, as do Respondents, that a clear and obvious split of fundamental statutory interpretation had developed between the Third Circuit on one hand, and the Fifth and Tenth Circuits on the other hand.

The issue now urged for certiorari has been squarely treated by the Third Circuit in *United Steelworkers of America v. North Star Steel Company*, 5 F.3d 39 (3d Cir. 1993), *cert. denied*, ___ U.S. ___, 114 S.Ct. 1060 (1994); relied upon by the District Court herein, and followed by the Third Circuit in this case. The issue is clearly presented, has been thoroughly argued, relied upon and decided below. It is ripe for review.

B. As This Matter Is A Question Of Statutory Construction, No Factual Record Need Be Before The Court.

Respondents seek denial of the Petition for Certiorari because of the alleged lack of a factual record as to the number of work days within the violation period regarding this matter.

As noted above, the District Court herein applied Third Circuit precedent when it found sixty (60) *calendar* days to be the appropriate measure of damages. Inasmuch as Third Circuit precedent did not permit consideration of work days vis-a-vis calendar days, the Petitioner below was not required (nor allowed) to demonstrate the number of work days within the violation period, as it would have been futile.

However, this is not a theoretical case requiring denial of the writ of certiorari. There are a certain number of work days within the sixty (60) day period in question. Should this Court grant certiorari, and thereafter determine the work days is the applicable measure of damages (as opposed to calendar days), the District Court can

adequately apply the rule as fashioned by this Court in its remand.

C. The Term "Improper Notice Period" Is The Equivalent Of "Violation Period."

Respondents' attempt to obfuscate the central issue in this matter (work day vs. calendar day) by focusing on the use of the term "Improper Notice Period" in the Question Presented (Petition for Certiorari pp. i and 11). It is submitted the term "improper notice period" is the equivalent of "violation period." It is clear from the Petition for Certiorari that the issue presented to this Court for review is the measure of damages – calendar days during the violation period or work days during the violation period. Thus, Respondents' assertion that a distinction should be made regarding work days in the "notice period" vis-a-vis the "violation period" is makeweight and wholly without merit.

POINT II

THE RECENT OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT IN SAXION V. TITAN C MANUFACTURING, INC. SUPPORTS THE GRANTING OF THE WRIT OF CERTIORARI.

In support of its position that the writ should be granted, Petitioner stated in its Petition for Certiorari that

> "It is axiomatic that any federal court that will handle a WARN case in the future will undoubtedly consider whether calendar-days or work-

> days is the appropriate method for calculating damages."

(Petition for Certiorari, p. 12). On the same day the instant petition for certiorari was filed with this Honorable Court, the United States Court of Appeals for the Sixth Circuit issued its opinion in *Saxion v. Titan C Manufacturing, Inc.*, 86 F.3d 553 (6th Cir. 1996).[1]

In that case, the Sixth Circuit adopted the work day approach to the measure of damages which Petitioner advocates herein. After an exhaustive discussion of the calendar day vs. work day issue, the Court concluded that the work day method adopted by the Fifth Circuit should be utilized. 86 F.3d at 558-561.

Thus, yet another Court of Appeals has disagreed with the holding of the Third Circuit. As of this date, three Courts of Appeal have held that the work day method is to be used to calculate damages. The Court of Appeals for the Third Circuit, however, continues to adhere to the calendar day approach.[2]

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[1] Respondents failed to address or otherwise mention this case in their Brief In Opposition.

[2] As discussed in greater detail in the Petition for Writ of Certiorari, some District Courts outside the Third Circuit have also adopted the "calendar day" method of damages. *See e.g. Siniscalchi v. Shop-Rite Supermarkets, Inc.*, 903 F. Supp. 182 (D. Mass. 1995).

CONCLUSION

For all the foregoing reasons, and for those reasons set forth in its Petition For A Writ Of Certiorari, Petitioner respectfully renews its request that the writ be granted.

Respectfully submitted,

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